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Supreme Court of the United States
OCTOBER TERM, 1978

Nos. 78-1088 and 78-1217

HENRY A. KISSINGER, *Petitioner,*

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al., Respondents,*

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et. al., Petitioners,*

v.

HENRY A. KISSINGER, *et. al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et. al.*

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BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et. al.*

QUESTIONS PRESENTED

1. Are transcripts of Henry Kissinger's official telephone conversations while Secretary of State—prepared to aid him in performing his governmental duties—"records" of the State Department under

federal statutes which could only be removed from Department custody if the Department and the General Services Administration determined that they had no governmental or archival value?

2. Does the Freedom of Information Act apply to records that were unlawfully removed from State Department custody and remain in its legal control and, if so, could the district court exercise its equitable powers to compel the Department to repossess the transcripts so they can be disclosed under the Act?

3. When Mr. Kissinger moved transcripts of his telephone conversations as Assistant to the President to the State Department and the President made no effort to exercise continuing control over those transcripts, did they become "records" of the Department for purposes of the Freedom of Information Act?

4. Are portions of the transcripts which relate to Mr. Kissinger's duties as chief executive of the National Security Council subject to disclosure under the Act when the State Department was the last agency which had physical custody over them?

5. Does the Constitution bar State Department record officers from reviewing those portions of the transcripts that touch on personal matters in order to insure that all official discussions which the transcripts contain are screened for possible disclosure?

STATEMENT OF THE CASE

A. The Creation and Functions of the Transcripts

During his eight years as Assistant to the President and Secretary of State, Henry Kissinger's secretaries routinely monitored his telephone conversations and

recorded their contents either by shorthand or on tape.[1] A. 150a, 244a. These stenographic notes and tapes were used to prepare detailed, often verbatim transcripts of Mr. Kissinger's conversations. A. 138a, 175a, 244a, 249a. The secretaries participating in this process were all government employees; the typewriters and monitoring equipment they employed were owned by the government; and the transcripts were prepared on government time and government premises. A. 83a, 138a. After their creation, the transcripts were retained as part of Mr. Kissinger's duties and stored in his White House and, later, Department of State offices. A. 139a, 150a, 244a.

Mr. Kissinger kept this detailed record of his telephone conversations to assist him and his staff in performing their official responsibilities. He has characterized the transcripts as "work aids to ease the administrative burdens" of his job. A. 245a. As he has stated, "[m]y purpose in causing the notes to be made was to create a rough record of those of my daily telephone conversations to which I or my immediate staff might wish to refer in order to follow-up on matters discussed orally." A. 244a. In an earlier lawsuit, Mr. Kissinger testified that the transcripts were "prepared, in accordance with routine government practice, in order to facilitate implementation and follow-up of business transacted." A. 150a.

The transcripts were in fact used for these purposes. According to Mr. Kissinger, "my executive secretary checked [the transcripts] periodically in order to prepare my appointment schedule and keep it current."

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[1] Tapes and stenographic notes used to prepare transcripts were destroyed immediately afterward. A. 153a, 244a.

A. 245a. The transcripts also facilitated the implementation of important decisions and enabled Mr. Kissinger's subordinates to take action on matters discussed over the phone. In Mr. Kissinger's words:

> "The notes were also read by my Senior Special Assistant so that he could keep abreast of my activities. This saved time, as it enabled him to know whether any matters I had discussed required follow-up or implementation without waiting for me to report the substance of my telephone conversations." *Id.*

There is evidence that transcripts of particular conversations were reviewed not only by Mr. Kissinger's immediate staff but by other government officials, including the President and some of his assistants.[2] There is also evidence that Mr. Kissinger edited particular transcripts before circulating them for review.[3]

State Department regulations and policies confirm the official functions which the transcripts served. Under Department regulations, "decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record." 5 Foreign Affairs Manual (FAM) § 423.2-1. Equally significant, when Mr. Kissinger was Secretary of State, the Department prohibited the monitoring of telephone conversations except when "deemed absolutely essential to the conduct of business." A. 123a. Thus, Mr. Kissinger could lawfully monitor and transcribe his telephone conversations only because these steps were necessary for the performance of his Department duties.

As a record of Mr. Kissinger's telephone conversations during each working day, the transcripts may reflect a few personal discussions between Mr. Kissinger and friends or family members.[4] However, the vast bulk of the transcripts provide a precise, contemporaneous account of Mr. Kissinger's official conversations—with "diplomats, government officials, two Presidents, scholars, [and] Congressmen"—as he conducted the foreign policy of the nation over an eight-year period. A. 245a.

B. The Safire FOIA Request

On January 12, 1976, Mr. Kissinger filed interrogatory answers in *Halperin* v. *Kissinger* (D.D.C.), a suit growing out of his activities as Assistant to the President. In these answers, Mr. Kissinger acknowledged that his telephone conversations between January 21, 1969 and February 12, 1971 had been monitored and

[2] In an affidavit filed in the district court, William Safire has recounted an incident in which the transcript of a conversation between Mr. Kissinger and a reporter was shown first to him (Mr. Safire was then a Special Assistant to the President) and later to Mr. Haldeman and the President himself. A. 175-181a. Mr. Kissinger purports not to recollect this incident. A. 191a.

[3] The Safire affidavit indicates that Mr. Kissinger edited the transcript of the conversation in question before circulating it to Mr. Haldeman and the President. A. 175a, 177a, 179a. Mr. Kissinger asserts that the transcripts were never edited. A. 246a.

[4] The record does not clearly indicate the extent to which the transcripts actually include personal conversations. In his interrogatory answers in *Halperin* v. *Kissinger*, Mr. Kissinger twice stressed that "[*b*]*usiness* telephone calls from my White House office were usually monitored by my personal secretaries . . ." A. 148a, 150a (emphasis added). Similarly, according to a story published in the *Washington Post* on December 28, 1976 (D15), Mr. Kissinger has said that, while many conversations relating to personal matters were monitored, only his business conversations were actually transcribed.

transcribed by White House secretaries. A. 148a-149a. The interrogatories did not ask about transcripts of Mr. Kissinger's telephone conversations since he had become Secretary of State, and Mr. Kissinger's answers did not refer to such transcripts.

On January 16, 1976, respondent William Safire submitted a Freedom of Information Act (FOIA) request to the Department of State. A. 49a-51a. Safire, a *New York Times* columnist, had been an assistant to President Nixon from 1969 to early 1973. Referring to Mr. Kissinger's interrogatory answers in *Halperin* v. *Kissinger,* he asked the Department to produce all transcripts of Mr. Kissinger's telephone conversations between January 21, 1969 and February 12, 1971 (1) in which his own name appeared or (2) in which Mr. Kissinger discussed the subject of "leaks" with certain named White House officials. A. 49a-50a.

Mr. Safire's FOIA request was denied in a letter dated February 11, 1976. According to that letter, the Department's Legal Adviser had concluded that the transcripts which he sought were not Department records "because of Dr. Kissinger's position at the time the documents were made." A. 169a. In addition, the letter asserted that these transcripts were in any event covered by various FOIA exemptions, including exemption 1 (which applies to classified information relating to national security).

Mr. Safire appealed the Department's denial of his request. A. 52a-55a. By a letter dated March 29, 1976, the Department informed Mr. Safire that his FOIA appeal had been decided adversely. A. 171a-173a. The letter indicated that the Department's Legal Adviser had again concluded that "documents which are originated in a White House office by a member of the President's immediate staff, such as the President's Special Assistant for National Security Affairs, are not subject to the Act." A.172a.[5] Nevertheless, the letter did not suggest that the transcripts were Mr. Kissinger's personal property, nor did it refer to transcripts of Mr. Kissinger's telephone conversations as Secretary of State.

C. The Removal of the Transcripts

On October 29, 1976, the transcripts were moved from the State Department to the New York estate of Nelson Rockefeller. A. 248a. Before taking this action, Mr. Kissinger did not consult the Department's Foreign Affairs Document and Reference Center (FADRC), which is responsible for implementing the Department's record maintenance and disposal program.[6] He also did not consult the National Archives and Records Service (NARS), a branch of the General Services Administration (GSA) which is responsible for records preservation throughout the federal government. Thus, Department record officers and NARS archivists had no opportunity to determine whether the transcripts were Department records, whether they

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[5] In contrast to the Department's initial denial, the Department's decision on appeal did not maintain that the transcripts contained classified information covered by FOIA exemption 1. According to the affidavit of the Department's Legal Adviser, the transcripts sought by Mr. Safire had been submitted to the Department's Council on Classification Policy, which determined that they did not contain classified information. A. 259a. Nevertheless, it should be noted that no such review ever took place with respect to the remaining transcripts, and there was never any determination that they also lacked classified information. *Id.*

[6] 5 FAM § 414.1.

contained classified information, or whether their preservation would aid the Department in performing its duties or serve long-range archival needs.

The only justification for the removal of the transcripts was contained in a memorandum prepared for Mr. Kissinger by the Department's Legal Adviser. A. 80a-84a. This memorandum was dated November 11, 1976, two weeks after the transcripts had been moved to the Rockefeller estate. It concluded that the transcripts were "essentially personal papers that [Mr. Kissinger is] entitled to retain when [he] leave[s] office." A. 80a. According to the memorandum, the transcripts had this status because Department of State regulations provide that a "retiring official may retain papers expressly designated or filed as personal from their time of origin or receipt." A. 81a. To support this proposition, the memorandum referred to 5 FAM § 417.1a, but neither quoted its language nor discussed its requirements. No other Department regulations were mentioned. As a "precaution", the memorandum urged Mr. Kissinger to prepare extracts of any "significant government activity or decision" recorded by the transcripts, but it suggested that this procedure was not required by Department regulations. A. 82a.

At the time of their transfer to the Rockefeller estate, there was no public announcement that the transcripts had left State Department custody. On November 11, 1976, two weeks after their removal, the *Washington Post* published an interview with a senior Department official. Without acknowledging that the transcripts had already left the Department, the official stated that the Department's Legal Adviser had concluded that they were " 'personal papers' which

may be taken with [Mr. Kissinger] when he leaves government." A. 86a. Mr. Kissinger was not scheduled to leave the State Department until January 20, 1977 and the official's remarks suggested that the transcripts would remain at the Department until his departure.

D. The First Agreement

On November 12, 1976, Mr. Kissinger entered into a Deed of Gift and Agreement (the "First Agreement") with the Librarian of Congress. A. 42a-46a. Under this Agreement, Mr. Kissinger promised to donate to the Library of Congress a collection of personal papers from his Harvard University period and government papers from his eight years in the Nixon and Ford Administrations. Paragraph 2 of the Agreement provides that the official materials in the collection will consist of "copies of government papers of which there is an original or record copy in government files." It also provides that all such materials must have been "approved for inclusion in the Collection" by "authorized officials."

Paragraphs 4 and 5 of the Agreement stipulate that public access to the collection will not begin until 25 years or 5 years from the death of Mr. Kissinger, whichever occurs later. Until that time, Paragraph 7 limits access to (1) employees of the Library of Congress who have been jointly approved by the Librarian of Congress and Mr. Kissinger; (2) persons who have received the written permission of Mr. Kissinger; and (3) after Mr. Kissinger's death, persons who have received the written permission of a committee to be named in his will. A. 44a. Under Paragraph 5, no government document can be disclosed to the public unless

the originating agency has determined that it contains no classified information. Paragraph 7 specifies that documents containing classified information may only be disclosed to persons with appropriate security clearances.[7]

In contrast to the barriers to public access which it creates are the privileges conferred by the Agreement on Mr. Kissinger himself. Paragraph 6 assures Mr. Kissinger unrestricted access to the collection during his lifetime. It also obligates the Library to provide Mr. Kissinger with working space where he can use the collection, and to make it available to all of his research assistants who have appropriate security clearances.

When the First Agreement was executed, a memorandum entitled "Donation Procedures" was prepared by the State Department to facilitate the transfer of government documents to the Library. A. 251a-257a. The memorandum stipulated that employees of the Department of State Document and Reference Center would review Mr. Kissinger's working files to insure that they did not contain any original or record copies of Department materials. When they found a document containing both personal and official matters, these employees were required to prepare "an extract of official contents . . . for inclusion in the Department's record system." A. 252a.

Appended to the "Donation Procedures" memorandum for Mr. Kissinger's signature was the Department's standard Separation Statement (Form JF-3). A. 255a-257a. This Statement required Mr. Kissinger to affirm that he had "surrendered to responsible offi-

[7] These restrictions on the dissemination of classified information do not apply to the "personal papers" in the collection.

cials . . . documents or material containing classified or administrative information furnished to me during the course of [government] employment or developed as a consequence thereof, including any diaries, memorandums of conversations, or other documents of a personal nature . . ." A. 255a. Mr. Kissinger also had to affirm that he had "surrendered to responsible officials *all* unclassified documents and papers relating to the official business of the Government . . ." A. 255a (emphasis added).

Mr. Kissinger's working files were reviewed by Department records officers pursuant to the "Donation Procedures" memorandum before their transfer to the Library. However, the transcripts of his telephone conversations remained at the Rockefeller estate and were never inspected by Department record officers. A. 247a. As a result, the Department's Document Center had no opportunity to assure that, in accordance with Mr. Kissinger's Separation Statement, all portions of the transcripts "relating to the official business of the Government" remained in Department files.

E. The Donation of the Transcripts

On December 24, 1976, Mr. Kissinger and the Librarian entered into a Second Deed of Gift and Agreement (the "Second Agreement"). A. 46a. Under this Agreement, executed nearly two months after the transcripts had been removed from the Department, Mr. Kissinger donated to the Library of Congress "additional personal papers consisting of the transcribed secretarial notes of his telephone conversations." The Second Agreement incorporates by reference all the

terms and conditions of the First Agreement.[8] It further provides that public access to the transcripts will be permitted only with the consent, or upon the death, of the other parties to the telephone conversations in question. Thus, unless Mr. Kissinger decides otherwise, the transcripts will be unavailable to the public until 25 years or 5 years from his death and that of the other parties to the conversation, whichever occurs later.

On December 28, 1976, the transcripts were transported directly to the Library from the Rockefeller estate. A. 249a. During the two months preceding this transfer, neither officials of the Department's Document Center nor NARS archivists received an opportunity to inspect the transcripts. Nevertheless, a number of weeks after they were moved to the Library, Lawrence M. Eagleburger, Mr. Kissinger's personal aide during most of his government service, extracted portions of the transcripts for inclusion in the files of the State Department and the National Security Council (NSC). A. 248a. In undertaking this task, Mr. Eagleburger was guided by the Department's Legal Adviser, who instructed him that these extracts should include "any significant policy decisions or actions not otherwise reflected in the Department's records." A. 259a.

F. The RCFP FOIA Requests

On December 28, 1976, the State Department announced that Mr. Kissinger was donating the transcripts of his telephone conversations to the Library

[8] Since the transcripts were classified as "personal papers" under the First Agreement, however, they are not subject to the First Agreement's safeguards against the disclosure of classified information to unauthorized persons.

of Congress. A. 167a. This announcement did not indicate that the transcripts had been moved to the Rockefeller estate two months earlier or that they were being deposited with the Library on the same day. On January 13, 1977, believing that at least some of the transcripts were still in Department custody, the Reporters Committee for Freedom of the Press and ten other organizations and individuals (collectively the "RCFP requesters") submitted an FOIA request to the Department.[9] A. 56a-60a. The requesters sought disclosure of the transcripts of Mr. Kissinger's conversations as both Special Assistant to the President and Secretary of State.[10] The RCFP request—which was filed a week before Mr. Kissinger resigned as Secretary of State—recited the requesters' understanding that portions of the transcripts were "still in the physical custody of the Department" and urged the Department not "to relinquish custody" until legal proceedings under the FOIA had been resolved. A. 57a-58a.

The Department denied the RCFP request in a letter of its Acting Legal Adviser dated January 28, 1977. A. 61a-63a. This letter advised the requesters that all of the transcripts had been delivered to the Library

[9] Another FOIA request was made by the Military Audit Project and its Director (collectively the "MAP requesters") in two letters dated December 28 and 29, 1976. A. 69a-72a. This request—which encompassed transcripts of telephone conversations and other materials generated while Mr. Kissinger was Secretary of State but not materials relating to his White House service—was denied on January 18, 1977. A. 73a. This denial was affirmed on administrative appeal on March 4, 1977. A. 78a-79a.

[10] The RCFP requesters also sought all "other materials that reflect, verbatim and substantially verbatim, the contents of the conversations, telephonic and otherwise, held by Henry Kissinger during his government service." A. 56a-57a. The Department denied this request as "unreasonably broad." A. 63a.

of Congress. Access under the FOIA, it asserted, could not be granted because the transcripts "are not agency records of the Department of State and are not in the custody or control of this Department." A.62a-63a. According to the letter, recourse to the Department's FOIA appeal procedures was unnecessary because the Department did not consider the transcripts its records. A. 63a.

G. The Archivist's Requests to Examine the Transcripts

Under the Federal Records Act of 1950[11] and the Records Disposal Act of 1943,[12] GSA is responsible for insuring that the agencies of the federal government observe uniform and effective records-maintenance policies. GSA's responsibility under these statutes has been delegated to the Archivist of the United States, who oversees the National Archives and Records Service. Upon learning of the donation of the transcripts to the Library of Congress, the Archivist questioned the legality of Mr. Kissinger's actions under the statutes which NARS administers.

In a letter to Mr. Kissinger dated January 4, 1977, the Archivist asked to inspect the transcripts so he could determine whether they were Department records which Mr. Kissinger had no authority to remove from Department custody.[13] A. 47a-48a. Mr. Kissinger rejected this request in a letter dated January 18, 1977,

[11] 44 U.S.C. §§ 2901-2909, 3101-3107.

[12] 44 U.S.C. §§ 3301-3314.

[13] The Archivist also sought to determine whether portions of the transcripts were materials of the Nixon Presidency, over which GSA had custody under the Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2107 *note*.

and enclosed a new memorandum of the Department's Legal Adviser justifying his actions. A. 88a-97a. That memorandum reiterated that, under 5 FAM § 417.1, a departing Department official may remove any paper that he has designated "personal". A. 93a. The extracts of the transcripts that Mr. Eagleburger was preparing, the memorandum maintained, would be sufficient to satisfy Department regulations and government-wide records statutes. A. 93a-94a.[14] Finally, the memorandum suggested that GSA had an "advocate's interest" in establishing a broad definition of official "records" and, for this reason, could not conduct an impartial inspection of the transcripts. A. 95a.[15]

The Archivist renewed his request to inspect the transcripts in a letter dated February 11, 1977, which was accompanied by a lengthy legal opinion of the General Counsel of GSA. A. 99a-116a. That opinion analyzed pertinent provisions of the Federal Records and Records Disposal Acts and concluded that they "make it quite clear that every agency's head shall operate the agency's records management program in full cooperation with and under regulations prescribed by GSA." A. 105a. Pointing out that GSA had issued government-wide regulations concerning the character of "personal papers" over ten years earlier, the opinion stressed its recent determination that "[t]he definition of official records involves materials made or received either in pursuance of Federal law or in connection with the transaction of public business." A.

[14] The provisions of law which purported to support this position, however, were not analyzed or discussed.

[15] The memorandum did not discuss whether transcripts dating from Mr. Kissinger's White House period were covered by the Presidential Recordings and Materials Preservation Act.

106a-107a. Application of this criterion to the transcripts, the opinion determined, was a task which Congress had committed to NARS archivists.[16] A. 109a-111a. Finally, the opinion emphasized that, under the federal records statutes, "a federal official may not conclusively establish a document as a personal paper, although its subject matter relates to official business, by merely designating it as personal . . . ." A. 112a.[17]

Mr. Kissinger did not respond to the Archivist's second request to inspect the transcripts.

H. Proceedings in the District Court

On February 8, 1977, the RCFP requesters (joined later by William Safire) filed suit in the District Court for the District of Columbia. A similar but more narrow suit was filed by the MAP requesters on March 8, 1977.[18] The two suits were consolidated on June 20, 1977. A. 3a. Named as defendants were the Department

[16] Under 44 U.S.C. § 2906(a)(1), GSA may inspect the records of any federal agency to ascertain the adequacy of its records-maintenance practices.

[17] The GSA legal memorandum also pointed out that the State Department's Legal Adviser had erroneously relied on an oral opinion of the Justice Department's Office of Legal Counsel that the transcripts were not federal records. In fact, the GSA memorandum explained, the opinion rendered by the Justice Department related to the Safire FOIA request for certain transcripts dating from Mr. Kissinger's White House period and rested on the rationale that the President and his immediate advisers were exempt from the FOIA. No judgment was requested or reached concerning the status of transcripts produced while Mr. Kissinger was Secretary of State. A. 115a.

[18] The RCFP Complaint sought access to the transcripts of Mr. Kissinger's telephone conversations as both Secretary of State and Assistant to the President, whereas the MAP suit was limited to transcripts from his State Department period.

of State and its present Secretary, the Library of Congress and the Librarian, Mr. Kissinger and the Archivist.

The RCFP plaintiffs included professional organizations of historians, political scientists and journalists and nine prominent scholars and writers.[19] Without access to the transcripts, they contended, the ability of scholars and journalists to analyze the Nixon and Ford presidencies would be severely hampered—particularly if Mr. Kissinger could use the transcripts in preparing accounts of his government service while they were unavailable to the public.[20] Plaintiffs' Complaints invoked the FOIA, the Federal Records Act, the Administrative Procedure Act and the federal mandamus statute. A. 23a, 34a-35a. They asked the court to declare that the transcripts had been unlawfully removed from the State Department and remained its "records" despite their present location. As ultimate relief, plaintiffs requested that the court require the Library to return the transcripts to the Department with directions to process them for disclosure under the FOIA. A. 40a-41a.

Cross-motions for summary judgment were filed by both sets of plaintiffs and Mr. Kissinger. The govern-

[19] In addition to the Reporters Committee, plaintiffs included the American Historical Association, the American Political Science Association, James MacGregor Burns, Nat Hentoff, Donald Herzberg, William Leuchtenberg, Arthur Link, J. Anthony Lukas, Austin Ranney, Clement Vose and William Safire.

Plaintiffs' contentions that the transcripts were essential to evaluating the Nixon and Ford presidencies were later documented in affidavits filed with the district court. A. 280a-290a.

[20] Newspaper reports have indicated that Mr. Kissinger has signed contracts for his memoirs worth over $2 million and that the memoirs may be published in late 1979. A. 156a-157a, 192a.

ment defendants initially opposed these motions and sought a court order which would have allowed GSA and State Department archivists to inspect the transcripts. JA 190-92.[21] Subsequently, however, the government defendants and Mr. Kissinger entered into a voluntary agreement which provided for a limited inspection of the transcripts. The government thereupon withdrew its opposition to the pending cross-motions.[22] JA 274-279. Nevertheless, it did not concede that the transcripts were no longer State Department records, that Mr. Kissinger's interpretation of Department regulations was correct, or that his removal of the transcripts from Department custody had been lawful.

On December 8, 1977, Judge Smith ruled on the cross-motions for summary judgment, deciding in plaintiffs' favor as to transcripts produced while Mr. Kissinger was Secretary of State, but denying relief as to transcripts of Mr. Kissinger's conversations as Special Assistant to the President. In its opinion, the district court emphasized that "State Department regulations require documentation of all official activities", including telephone conversations, and that Department policy "prohibits monitoring of telephone conversations except when 'absolutely essential to the conduct of business'." Pet. App. 56a.[23] The court also pointed out that "under his own regulations, Dr. Kissinger had no alternative but to document the matters discussed in the conversations", and that the "significance of the commitments, decisions, and discussions

[21] "JA" refers to the joint appendix in the court of appeals.

[22] The RCFP requesters are unaware of whether this inspection has been completed and, if so, what its outcome has been.

[23] "Pet. App." refers to the Appendix to Mr. Kissinger's petition for certiorari.

embodied in these conversations is apparent from the stature of the other parties to them (two presidents, heads of State, Cabinet Officers, diplomats, legislators, scholars, journalists and others) . . . ." *Id.* Finally, the court emphasized that the transcripts "were produced not only in accordance with Department regulations but also on government time and with the aid of department employees, equipment, materials, and other public resources." Pet. App. 58a.

To analyze the significance of these facts, the court invoked a substantial line of cases holding that, in both the private and governmental sphere, "work created by an employee within the scope of employment is the property of the employer." Pet. App. 56a. Based on this principle, the court then held that, "[h]aving been prepared and transcribed 'in the discharge of [Mr. Kissinger's] official duties', the notes [were] property" of the Department of State. Pet. App. 58a. The preparation of extracts, the court concluded, did not transform the original transcripts into personal papers because Department regulations do "not permit agency employees to extract personal matters from official correspondence and to then treat the correspondence as personal." Pet. App. 58a n.12. Nor did Department regulations permit Mr. Kissinger to treat the transcripts as his own property merely because he had designated them "personal" when they were prepared. As the court found, 5 FAM § 432 only permits "personal" designation for "[p]apers . . . which pertain only to an individual's private affairs." Pet. App. 55a-56a n.9.

Under the Federal Records Act, the court determined, records may be removed from an agency only if it has listed them in a schedule submitted to GSA

and GSA has concurred in their disposal. Pet. App. 54a. The transcripts had never undergone this procedure, the court reasoned, and therefore retained their status as Department "records". Recognizing that the transcripts would be subject to the FOIA if they were still stored on Department premises, the court held that they were not immunized from disclosure merely because they were no longer in the Department's actual custody. Rather, it determined, when an agency has taken no action to retrieve unlawfully removed records, a court could exercise its "broad equitable powers" under the FOIA to return those records to agency possession. Pet. App. 55a.

The district court devoted little attention to the transcripts of Mr. Kissinger's conversations as Special Assistant to the President. Referring to these transcripts only in passing, the court commented—mistakenly it turned out [24]—that plaintiffs had withdrawn their claim to them at oral argument and further consideration of their status was unnecessary.

On January 25, 1978, Judge Smith issued an order implementing his opinion. Pet. App. 59a-61a. The order directs that the transcripts of Mr. Kissinger's

[24] According to the transcript of the oral argument, such a concession was made by counsel for MAP requesters, who had never sought the White House transcripts in their Complaint, but not by the RCFP requesters, who had expressly sought access to the White House transcripts in their Complaint (A. 22a) and briefed their entitlement to them at length in their summary judgment papers. A. 265a-267a. Although the RCFP requesters brought this error to the attention of the lower court and sought clarification of its opinion, Judge Smith's order of January 25, 1978 denied plaintiffs' summary judgment motion with respect to the White House transcripts. Pet. App. 60a. The court of appeals apparently recognized the lower court's error and considered the status of the White House transcripts on its merits. Pet. App. 49a.

conversations as Secretary of State are to be returned to the Department, which must then review them to determine which are subject to mandatory disclosure and which may be withheld under the FOIA's exemptions. After the Department has identified the portions of the transcripts which it will disclose, these transcripts must be inspected by Mr. Kissinger. No transcripts can be released to the public until he has had an opportunity to ask the district court to restrain disclosure on the basis of FOIA exemption (b)(6), which applies to agency records whose release would "constitute a clearly unwarranted invasion of personal privacy." [25]

Implementation of Judge Smith's order was subsequently stayed.[26]

I. Proceedings in the Court of Appeals

Mr. Kissinger, but not the government defendants, appealed from the district court's order to the court of appeals.[27] On November 7, 1978, the court issued a

[25] In its Brief, the government has asserted that, under this Court's opinion in *Chrysler Corp.* v. *Brown*, No. 77-922 (Apr. 18, 1979), Mr. Kissinger lacks standing under the FOIA to object to the disclosure of documents that the Department has not chosen to withhold under an FOIA exemption. Brief for the Federal Parties (hereafter "Gov. Br.") 16 n.12. If this Court upholds the other provisions of the lower court's order, the propriety of this procedure can be considered on remand.

[26] This Court issued a stay on April 24, 1978, 435 U.S. 993, pending the completion of proceedings in the court of appeals. Subsequently, the court of appeals stayed its mandate pending the completion of proceedings in this Court.

[27] In the court of appeals, the government chose to participate as an *amicus curiae* and presented a legal analysis which, if accepted, would have required the case to be remanded for further proceedings.

per curiam judgment affirming the decision of the district court. Pet. App. 47a-50a. In a brief accompanying memorandum, the court stated that, because the government had not appealed, "a judgment affirming the District Court on the ownership issue may make consideration of most of the other issues Mr. Kissinger raises unnecessary." Nevertheless, the court emphasized that it was "in full agreement on all issues" with the decision of the district court. Pet. App. 49a.

Acknowledging that the district court may have misconstrued cross-petitioners' position regarding the White House transcripts, the court nevertheless determined that the result which it reached was correct. Pet. App. 49a. Three considerations, it indicated, supported this conclusion: (1) the FOIA does not cover those Presidential advisers "who are so close to him as to be within the White House"; (2) the relocation of the transcripts to the State Department did not bring them within its disclosure responsibilities under the FOIA; and (3) the fact that portions of the transcripts may reflect the affairs of the NSC, an agency to which the FOIA does apply, provided no basis for disclosure in the absence of an FOIA request directed to that agency. Pet. App. 49a-50a.

SUMMARY OF ARGUMENT

The transcripts of Mr. Kissinger's telephone conversation were prepared to aid him in performing his government duties during his eight years as Assistant to the President and Secretary of State. They contain a detailed, often verbatim account of the transaction of important government business by Mr. Kissinger and the many foreign and domestic leaders with whom

he spoke. As a daily record of the activities of America's leading diplomat during a period of great national controversy, the transcripts represent a collection of first-hand materials on foreign and domestic policy that is invaluable. Few documents can contribute more substantially to the central goal of the Freedom of Information Act—to promote public understanding of significant government decisions and actions.

Since late 1976, however, the transcripts have been unavailable to the public as well as to officials of the present Administration. Asserting that they were his "private papers," Mr. Kissinger removed the transcripts from State Department custody under conditions of unusual secrecy and then arranged for their "donation" to the Library of Congress. The Agreement governing that "donation" allows Mr. Kissinger full use of the transcripts and authorizes him to forbid access by all others. Thus, the transcripts are now held on terms which frustrate the objectives of the FOIA.

The lower courts required the return of the transcripts to the State Department and directed the Department to review and process them in accordance with the FOIA. In granting this relief, the courts made two determinations: (1) the transcripts are "records" of the Department of State, not "private papers", and Mr. Kissinger could not lawfully remove them from Department custody; and (2) since they remain Department "records" in every respect except location, the transcripts were not immunized from the FOIA by their removal from the Department but can be returned to it for FOIA review and disclosure. Both of these holdings are plainly correct.

I.

A long line of decisions embodies the principle that documents created during a government employee's official duties are public property which the government, not the individual employee, controls. When Congress adopted the Records Disposal and Federal Records Acts, it did not abandon this principle. Rather, it created a mechanism for records disposal which seeks to assure that no document which reflects public business is removed from agency custody until the originating agency and GSA, applying uniform criteria, have determined that the document should not be preserved. To implement this scheme, 44 U.S.C. § 3301 defines "records" in broad terms that reach all documents which are "appropriate for preservation" as evidence of an agency's activities and operations. This broad definition of "records" is embodied in the Presidential Records Act of 1978, a statute which seeks to put presidential records on the same footing as all other records of the Executive Branch. While there is a narrow class of "non-record materials" that does not fall within 44 U.S.C. § 3301, the defining characteristic of these materials is that they are so devoid of value as evidence of agency affairs that they are not "appropriate for preservation" under the statutory standard. No agency has discretion to reclassify a document which *does* have such evidentiary value as a "non-record."

GSA, which has government-wide responsibility for implementing the records statutes, has interpreted 44 U.S.C. § 3301 to encompass any document "relevant to the conduct of official business." GSA's concept of "records" is incorporated in the procedures and policies of virtually every federal agency. The State Department is no exception. The Department's regulations permit employees to retain documents which pertain only to their private affairs, and even personal documents may not be removed if they contain classified information. Moreover, when a document is properly designated personal, the employee must still extract *all* official information for inclusion in Department files.

Thus, in accordance with statutory requirements and GSA regulations, the Department treats materials (like the transcripts) which relate to Department business as "records" which can only be disposed of in accordance with the statutory procedures for records disposition. Because the transcripts were removed from Department custody without adherence to these procedures, their removal was unlawful and the transcripts have never ceased to be Department "records."

II.

As Department "records", the transcripts would be subject to the FOIA if requesters had sought their disclosure while they were still in Department custody. The unlawful removal of the transcripts from the Department a few weeks before those requests were filed did not change their status under the FOIA. The Act's broad disclosure requirement applies to *all* "records", wherever located. 5 U.S.C. § 552(a)(3). There is no exemption in the statute for "records" that happen to be outside the agency's physical custody at the time an FOIA request is made. Moreover, records that an agency owns and legally controls can clearly be described as "withheld" under 5 U.S.C. § 552(a)(4)(B) even if they are not stored on agency premises.

When an agency fails to produce such records, it is thus "withholding" them in violation of the Act and the courts have jurisdiction to require an appropriate remedy.

The legislative history of the FOIA reinforces the natural meaning of the statutory language. The FOIA was enacted to achieve the broadest possible disclosure of information about government activities, subject only to nine narrowly drawn exemptions. If the Act did not apply to unlawfully removed records, government officials would be free to suppress sensitive or embarrassing documents simply by removing them from the physical custody of the originating agency or transferring them to a branch of government to which the Act does not apply. The policy of broad disclosure that the FOIA embodies would be frustrated if such changes in the physical location of records immunized them from the Act.

Under *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), the district courts may utilize their broad equitable powers to remedy violations of the FOIA. Thus, once it determined that the transcripts were Department "records", the district court was empowered to order the Department to repossess and process them under the Act. Use of the FOIA to recover wrongfully removed records will promote, not weaken, the policies of the Federal Records Act by aiding the government in preserving valuable records for public use and disclosure. Moreover, under the decisions below, the FOIA only applies to unlawfully removed records, not to records removed in accordance with the statutory procedures for records disposition. Thus, the vast bulk of government documents removed from agency custody would not be

reachable by an FOIA request, and the courts would not intrude into legitimate agency recordkeeping activities.

III.

The lower courts erred in refusing to return the White House transcripts to the State Department for FOIA review and disclosure. These transcripts also record the transaction of official business, were prepared to facilitate the performance of Mr. Kissinger's governmental duties, and were removed from the Department without adherence to the statutory procedures for records disposition. It is no objection to the production of these transcripts under the FOIA that they originated at the White House, not the Department of State. An agency that controls records of government business is not relieved from complying with the FOIA merely because those records were created elsewhere in the government. While records of the White House Office of the President may be immune from the FOIA if they remain in the President's custody, the transcripts were transferred to the State Department and the President failed to exercise any further control over their use. Moreover, a sizable portion of the White House transcripts reflects Mr. Kissinger's duties as head of the NSC, rather than as an advisor of the President. The NSC is part of the Executive Office of the President and is therefore an "agency" subject to the FOIA. 5 U.S.C. § 552(e). For this reason, transcripts of conversations in which Mr. Kissinger was directing the affairs of the NSC were "records" covered by the Act when they were held at the White House, and the Department became obligated to produce them when they were transferred into its custody.

IV.

The district court's order does not violate Mr. Kissinger's privacy rights under the Constitution. Under many decisions of this Court, including *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), no right of privacy attaches to documents relating to public business. It is true that the district court's order directs Department officials to review transcripts of personal conversations in order to segregate the much larger number of transcripts concerning government affairs. However, this procedure is necessitated by Mr. Kissinger's own practice of monitoring business and personal conversations indiscriminately and is the only way to assure that all business-related transcripts are screened for FOIA disclosure. Thus, the district court's order represents the least intrusive means of affording requesters the relief under the FOIA to which they are entitled.

ARGUMENT

I.

THE TRANSCRIPTS ARE "RECORDS" OF THE DEPARTMENT OF STATE WHICH MR. KISSINGER REMOVED UNLAWFULLY FROM DEPARTMENT CUSTODY

The basic premise underlying Mr. Kissinger's removal of the transcripts from State Department custody is that they were not Department records but personal papers over which he could exercise sole control. This premise, however, is contradicted by the character and uses of the transcripts. The transcripts do not reflect Mr. Kissinger's private ruminations about foreign and domestic policy. Instead, they record, often in meticulous detail, the transaction of important government business by Mr. Kissinger and major foreign and domestic leaders. Moreover, the transcripts were not prepared as a private diary of Mr. Kissinger's activities. Their express function was to facilitate the performance of his official duties, and they were in fact used by Mr. Kissinger and his aides for this very purpose.

Because of these factors, the status of the transcripts is controlled by the basic doctrine that materials created in the course of a government employee's official duties belong to the government agency for which they were produced, not the individual employee. This doctrine is reflected in a large body of case law. It is also reflected in the statutory provisions, administrative regulations and actual practices which govern the use and disposal of records by the Department of State and other federal agencies.

At 44 U.S.C. § 3301, the Federal Records Act of 1950 defines "records" in broad terms that encompass any document which is "appropriate for preservation" as evidence of the official business of a federal agency. This broad definition was recently reaffirmed by Congress in the Presidential Records Act of 1978, a statute enacted to insure that all presidential materials are screened by the Archivist before they are removed or destroyed. Authority to implement 44 U.S.C. § 3301 resides with GSA, which promulgates regulations that control records-maintenance practices throughout the federal government. Significantly, GSA has determined that official "records" include all documents "relevant to the conduct of public business"—a principle which virtually all federal agencies have consistently observed.

As the Government suggests, the statutory definition of "records" excludes a small category of "non-record materials" prepared as part of a government employee's official duties. Individual agencies, however, do not have broad discretion to classify official documents as "non-record materials." Rather, such materials consist solely of uncirculated notes, working drafts, office directories and similar documents which are wholly ministerial in nature or represent the personal work product of the employee. These documents do not provide direct evidence of an agency's substantive activities and cannot be considered "appropriate for preservation" within the meaning of 44 U.S.C. § 3301. The transcripts, by contrast, were prepared to document the actual transaction of important agency business and clearly qualify as "records" under the statutory definition.

The broad definition of "records" in 44 U.S.C. § 3301 is embodied in State Department regulations. The Department permits employees to retain only those documents which relate to their private affairs. Moreover, echoing government-wide policies established by Executive Order, the Department forbids employees from retaining *any* document (official or personal) which contains classified information. Under Department regulations, the preparation of "extracts" cannot transform Department records into personal papers. Extracting is only permitted for documents that are predominantly personal in character. In addition, the Department requires extracts to include *all* portions of a document that relate to agency business. Since the extracts of the transcripts which Mr. Eagleburger prepared omitted a substantial amount of official information, the original transcripts should have remained in Department files even if extracting was permissible to start with.

Once a document is a "record" under 44 U.S.C. § 3301, it can only be removed or destroyed in accordance with the provisions of the Records Disposal Act governing records disposition. Under these provisions, the originating agency must determine, and GSA must concur, that the document is not needed to transact current business and does not have sufficient archival value to warrant permanent preservation. 44 U.S.C. § 3303. When the transcripts of Mr. Kissinger's telephone conversations were removed from the State Department, this careful screening process was ignored. The transcripts were never reviewed by Department records officers, never listed in a records disposal schedule submitted to GSA, and never examined by NARS archivists. As a result, neither the Department nor GSA made the required finding that the transcripts lacked "sufficient administrative, legal, research or other value to warrant further preservation." 44 U.S.C. § 3303. Under these circumstances, Mr. Kissinger's removal of the transcripts from Department custody was unlawful, and the transcripts have never ceased to be Department "records."

A. Case Law Establishes That the Transcripts Are Property of the Department of State

It is well-established that an employer is presumed to be the owner of a work created by his employees within the scope of their employment. This principle has been applied in numerous cases involving the property rights of private employees. *E.g., Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied,* 397 U.S. 936 (1970); *Brattleboro Publish-*

ing Co. v. *Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966); *Nelson* v. *Radio Corporation of America*, 148 F.Supp. 1, 3 (S.D.Fla. 1957). The considerations underlying these cases apply with special force to public employment, where the work product of employees may often have major significance for society as a whole. Accordingly, "[a]ll of the decided cases, both federal and state, hold that where records are produced by a public official or a public employee as part of his governmental activity, with the assistance of other governmental employees, the use of governmental machines and supplies, and on government time, they are public records and belong to the government."[28]

In an 1874 decision, the Virginia Supreme Court of Appeals described the legal status of documents created by a government employee in the following terms:

> "Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, *whether expressly required so to do or not; and when kept it becomes a public document—a public record belonging to the office and not the citizen, and is in no sense a private memorandum.*" *Coleman* v. *Commonwealth*, 66 Va. (25 Gratten) 865, 881 (1874) (emphasis added).

Numerous cases have applied these principles. For example, *United States* v. *First Trust Co. of St. Paul*,

[28] National Study Commission on Records and Documents of Federal Officials (hereafter "National Commission"), *Memoranda of Law* 3 (1976).

All of the parties in this case have referred in their briefs to various documents prepared by the National Commission. For the Court's convenience, we intend to lodge copies of these documents with the clerk before oral argument.

251 F.2d 686 (8th Cir. 1958), involved the ownership of rough notes prepared by William Clark during the Lewis and Clark expedition to aid him in writing his private diary. The court reasoned that "[i]f Clark's notes are the written records of a government officer executed in the discharge of his official duties, they are public documents and ownership is in the United States." 251 F.2d at 688. Holding that the notes were the property of Clark, the court emphasized that they were not intended to be used for any official function and were prepared merely as background for Clark's private account of the expedition. For these reasons, the court concluded, the notes were not the "work product of a government representative engaged in the performance of his duties." 251 F.2d at 690.[29]

Identical reasoning was employed in *Sawyer* v. *Crowell Pub. Co.*, 46 F.Supp. 471 (S.D.N.Y. 1942), *aff'd.* 142 F.2d 497 (2d Cir.), *cert. denied*, 323 U.S. 735 (1944), where the court held that a map created by Department of the Interior employees was government property. The court based its decision on the general rule that, "when an employee creates some-

[29] The general rule in the private sector is that "[c]orporate books and records are the property of the corporation and not of the officers or directors or stockholders. . . ." Fletcher, *Cyclopedia of the Law of Private Corporations* § 2192 at 636 (rev. perm. ed. 1976) (footnote omitted). *See also McElree* v. *Darlington*, 187 Pa. 593, 595, 41 A. 456 (1898). The courts have frequently granted equitable relief, including mandamus, to prevent retiring corporate officials from expropriating corporate books and records. *E.g.*, *Martin* v. *Carl*, 213 Md. 564, 132 A.2d 601 (1957); *Nancy Lee Mines, Inc.* v. *Harrison*, 93 Idaho 652, 471 P.2d 39 (1970); *State ex rel. Immanuel Presbyterian Church* v. *Riedy*, 50 La. Ann. 258, 23 So. 327 (Sup. Ct. 1898); *State ex rel. Cooper Butte Mines* v. *Guertin*, 106 Minn. 248, 119 N.W. 43 (1909); *People ex rel. Keeseville, A.C. & L.C.R.R.* v. *Powers*, 145 App. Div. 693, 130 N.Y.S. 529 (1911).

thing in connection with his duties under his employment, the thing created is the property of the employer." 46 F.Supp. at 473.[30] In determining that the map was not owned by the employees, the court emphasized that it was generally related to the employees' work, it was prepared on government time and with government resources, and the employees had not received any compensation for their efforts apart from their government salaries. *Id.*

The same approach is embodied in *Public Affairs Associates, Inc.* v. *Rickover,* 268 F.Supp. 444 (D.D.C. 1967), where Admiral Rickover sought to prevent the publication of certain speeches without his permission on the ground that they were his own property. After

[30] A similar rule has been consistently applied to inventions and scientific discoveries which grow out of government employment. As this Court stated the general rule in *Solomons* v. *United States,* 137 U.S. 342, 346 (1890):

> "If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer."

Elaborating on this approach is *Houghton* v. *United States,* 23 F.2d 386, 391 (4th Cir.), *cert. denied,* 277 U.S. 592 (1928), where a chemist employed by the Public Health Service unsuccessfully sought to maintain a patent on a fumigant gas to which the government claimed title. As the court said:

> "The Public Health Service represents the people of the United States. Its interest is their interest. Its investigations and discoveries are made for their benefit. . . . It is unthinkable that, where a valuable instrument in the war against disease is developed by a public agency through the use of public funds, the public servants employed in its production should be allowed to monopolize it for private gain . . . ."

Numerous other cases have reaffirmed this approach. *E.g., Mine Safety Appliances Co* v. *United States,* 364 F.2d 385, 391 (Ct. Cl. 1966); *Technitrol, Inc.* v. *United States,* 440 F.2d 1362, 1372 (Ct. Cl. 1971); *Jacobs* v. *United States,* 239 F.2d 459 (4th Cir. 1956), *cert. denied,* 353 U.S. 904 (1957).

the district court and the court of appeals had decided the case on narrow grounds of copyright law,[31] this Court granted certiorari and, in remanding for further proceedings, emphasized that the case presented

> "matters of serious public concern. They relate to claims to intellectual property arising out of public employment. They thus raise questions touching the responsibilities and immunities of those engaged in public service, particularly high officers, and the rightful demands of the government and the public upon those serving it." *Public Affairs Associates, Inc.* v. *Rickover,* 369 U.S. 111, 112-113 (1962).

The Court directed the district court to determine "the circumstances of the preparation and of the delivery of the speeches in controversy in relation to the Vice-Admiral's official duties." *Id.* at 113. Obeying this directive, the court held on remand that "[t]he fundamental determination . . . is whether the disputed speeches fall within the purview of Admiral Rickover's official duties." 268 F.Supp. at 448 (citations and footnotes omitted), and "[i]n this context, the duties of a high Government official should not be narrowly interpreted." 268 F.Supp. at 448-49. Applying this test, the court ultimately upheld the Admiral's claim of ownership only because the "speeches were handled as private business from start to finish." 268 F.Supp. at 449.[32]

[31] 177 F.Supp. 601 (D.D.C. 1959), *rev'd and remanded,* 284 F.2d 262 (D.C. Cir. 1960).

[32] As the court emphasized, the speeches were written at the Admiral's home during his leisure time, he was not on duty or acting as a government representative when giving the speeches, they were delivered before private audiences, and the speeches purported to reflect Admiral Rickover's personal views, not official government policy, and often covered topics unrelated to his government responsibilities. 268 F.Supp. at 449.

Most recently, in a case involving the materials of Richard Nixon's presidency, the District Court for the District of Columbia reaffirmed the "general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the official." *Nixon* v. *Sampson,* 389 F.Supp. 107, 133 (D.D.C. 1975), *stayed sub nom. Nixon* v. *Richey,* 513 F.2d 430 (D.C. Cir. 1975), *dismissed as moot,* 437 F.Supp. 654 (D.D.C. 1977), *rev'd and remanded,* No. 77-2123 (D.C. Cir. December 21, 1978). Significantly, the materials that the court held were government property included memoranda of conversations between the former President and foreign heads of state and records of conversations between Mr. Nixon and his aides. 380 F.Supp. at 132-133 nn. 71-72.

Under these decisions, the transcripts of Mr. Kissinger's telephone conversations must be considered Department property rather than private papers. The transcripts were produced by government employees on government time and with government equipment; under Department policy, the monitoring of telephone conversations conducted by these employees was permissible only when essential for the conduct of official business. In addition, the express purpose for the creation of the transcripts was to assist an important government official in performing his official duties. Most importantly, the transcripts represent Mr. Kissinger's conversations on official business—with foreign diplomats, other officials of the Executive Branch concerned with foreign policy, two Presidents, fellow Cabinet members, and members of Congress—

while conducting America's foreign policy for eight years. It is impossible to imagine conversations which more directly reflect the official business of the nation.

B. Under the Federal Records Act and State Department Regulations, the Transcripts Are "Records", Not "Non-Record Materials"

The Government acknowledges that the transcripts were government property, not private papers, throughout Mr. Kissinger's tenure as Secretary of State. It suggests, however, that there is a class of documents called "non-record materials" which are produced in connection with an employee's government duties but do not qualify as "records" under the federal records statutes. While these documents are owned by the originating agency, the Government contends that they are not subject to the records disposition procedures in Chapter 31 of 44 U.S.C., and thus can be removed by individual employees in the agency's discretion. Gov. Br. 39-42.

We agree that a limited category of non-personal documents created by government employees cannot be defined as "records" under 44 U.S.C. § 3301. The transcripts, however, clearly must be classified as "records" for two separate reasons. First, the definition of "records" in 44 U.S.C. § 3301 is extremely broad and includes all documents which are "appropriate for preservation" as evidence of agency activities and functions. The only materials that the definition excludes are documents that have so little value as evidence of government business that they are not "appropriate for preservation" under any possible standard. Second, even if the State Department could have classified the transcripts as "non-record materials", it did not do so. Instead, Department regulations provide

that *all* documents which reflect Department functions are "records" and must remain in its files when individual employees retire.

1. The Federal Records Act Defines "Record" as any Document Which May Provide Evidence of Agency Activities and Functions

The Records Disposal and Federal Records Acts establish a comprehensive system of records management for the entire federal government. The objectives of this system include "accurate and complete documentation of the policies and transactions of the Federal Government", "judicious preservation and disposal of records", and "[d]irection of continuing attention on records from their initial creation to their final disposition." 44 U.S.C. § 2902.

The Records Disposal Act prescribes detailed procedures for disposing of "records." 44 U.S.C. § 3303 specifies that, in accordance with regulations issued by GSA, an agency may propose records for disposal when it determines that they are not needed "in the transaction of its current business" and do not have "sufficient administrative, legal, research, or other value to warrant their further preservation by the Government." The agency must then list these records in a schedule submitted to GSA. Under 44 U.S.C. § 3303a, GSA may authorize the agency to dispose of the records if it concurs that they lack governmental or historical importance. However, if GSA disagrees with the agency and concludes that the records should be preserved, they will be stored in the facilities of the National Archives system, established by 44 U.S.C. §§ 2903, 2907, where they will remain available to meet the needs of the government and the general public. Congress specifically prohibited the removal of records except in accordance with these procedures. Under 44 U.S.C. § 3314, "[t]he procedures prescribed by this chapter are exclusive, and records of the United States government may not be alienated or destroyed except under this chapter."

The objective of this statutory scheme is to insure that no "records" are destroyed or surrendered to private citizens unless the originating agency and GSA, applying uniform criteria, have concluded that their preservation will not benefit the government or the public. As stated in the legislative history of the Records Disposal Act's predecessor statute, Congress sought to "provide a clearly defined, simple, uniform and exclusive procedure for disposing of records of the United States Government that are not needed in the transaction of current business and that appear to have no permanent value or historical interest." [33] The central role of this review process in the total statutory scheme suggests the need for a broad definition of "record." If a document is not a "record," the statutory disposal procedures will not apply, and the document could be removed without undergoing the careful screening by the originating agency and GSA which Congress mandated.

To determine the proper definition of "record", four sources are relevant: (1) 44 U.S.C. § 3301, where Congress has defined the term; (2) the recently enacted Presidential Records Act of 1978, which creates pro-

[33] H.R. Rep. No. 838, 76th Cong., 1st Sess. 1-2 (1939). This Report relates to H.R. 6585 which, as enacted, became the General Disposal Act of 1939 (Pub. L. No. 295, 53 Stat. 1219). This Act was the first Congressional attempt in this century to create a comprehensive approach to records management. Like later statutes, it assigns the Archivist a central role in the records disposal process.

cedures for disposing of official materials created by the President and his aides; (3) the regulations of GSA, which is charged with implementing the records statutes; and (4) the practices and policies which federal agencies have adopted in response to statutory and GSA requirements. Each of these sources demonstrates that a document must be considered a "record" subject to statutory disposal procedures unless it has no conceivable value as evidence of government activities and operations.

a. 44 U.S.C. § 3301

At 44 U.S.C. § 3301, the Federal Records Act defines "records" of the United States to include:

> "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government . . . *in connection with the transaction of public business and preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government* or because of the informational value of data in them" (emphasis added).

The thrust of this provision is to establish an expansive definition of "records" that will have government-wide application. Under the definition, documents which originate "in connection with the transaction of public business" will be considered "records" if they are "preserved or appropriate for preservation" as evidence of government "policies, decisions, procedures, operations or other activities." This wording is comprehensive and reaches *all* documents which are prepared for official purposes and may be of value in documenting the workings of the government.

Mr. Kissinger and the Government point to the phrase "preserved or appropriate for preservation" in 44 U.S.C. § 3301 and argue that individual agencies have discretion to determine which documents relating to official business will have the status of "records."[34] Brief for Petitioner and Cross-Respondent Henry A. Kissinger (hereafter "Kiss. Br.") 33-34; Gov. Br. 39-41. However, these words simply do not have the meaning which Mr. Kissinger and the Government assert. Nowhere do they state or imply that individual agencies have broad authority to decide when an official document will become a "record";[35] indeed, 44 U.S.C. § 3301 does not mention the authority of individual agencies at all.

There is a more natural reading of the phrase "preserved or appropriate for preservation" which Mr. Kissinger and the Government do not discuss. Under this reading, the statutory definition would encompass

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[34] The Government and Mr. Kissinger also rely on 44 U.S.C. §§ 3101 and 3102 to support this argument. Under these provisions, individual agencies are responsible for creating "records containing adequate and proper documentation" of the agency's activities and for conducting an "active, continuing program for the economical and efficient management" of the agency's records, including "effective controls over the creation and over the maintenance and use of records in the conduct of current business."

These provisions authorize agencies to exercise discretion in determining when records will be created, how they will be used, and under what circumstances they will be proposed for disposal. Nowhere do they suggest, however, that, once a document relating to agency business has been created, an agency is free to determine that it is not a "record" within the meaning of 44 U.S.C. § 3301.

[35] Such language would not have been hard to draft. Congress could, for instance, have defined records as "documents which an agency has decided to preserve." Such language would have explicitly recognized the power of agencies to classify official documents as "records" or "non-records."

both documents that the agency has specifically decided to retain (*i.e.*, has "preserved") and documents that are potentially worthy of retention (*i.e.*, are "appropriate for preservation") because they provide evidence of the functions, policies or operations of the originating agency. Thus, the effect of the statutory language would be to reach documents that the agency has affirmatively included in its files as well as documents that may have a less formal status under agency regulations but still are of value in documenting the agency's affairs.[36] Under this approach, if a document originates in connection with public business and can shed light on an agency's activities, it would be "appropriate for preservation" as evidence of the agency's operations and would qualify as a "record" within the meaning of 44 U.S.C. § 3301. Since such a document would have potential archival significance, its "record" status would fulfill the objectives of the records statutes; the document would be subject to statutory disposal procedures and GSA would have an opportunity to decide whether it should be permanently retained.

This reading of 44 U.S.C. § 3301 does not mean that every single document created by government employees must be considered a "record." There are many official documents that are so clearly lacking in value

[36] Consistent with this approach, GSA's General Counsel has indicated that a document's status as a "record" does not depend on whether its creation was specifically mandated by statute or regulation:

> "[W]e call into question the significance of the fact that no statute mandated [a document's] creation. With rare exception, this is true of any particular documents we call federal records. The significance to the custodial agency and GSA is not that they didn't have to be created, but that they were created. Given the fact of their creation and existence, they may be disposed of only in accordance with applicable statute and regulation (44 U.S.C. 3314)." A 114a.

as evidence of agency activities that they simply are not "appropriate for preservation" under the statutory definition. Examples of such documents are ministerial materials like daily calenders or office directories which do not contain substantive information about agency activities. Other examples are uncirculated drafts or notes which represent the personal work product of the employee. Because these documents are not shared with other employees and do not directly document the transaction of agency business, they do not provide evidence of actual agency activities and operations and fall short of the statutory test for retention. It is undoubtedly this class of materials to which the House Report on the Disposal Act refers when it comments that 44 U.S.C. § 3301 "make[s] it clear that [agencies] are not obliged to consider every scrap of paper on which writing or printing appears as a record." H.R. Rep. No. 559, 78th Cong., 1st Sess 1 (1943).[37]

[37] In addition to relying on this statement, Mr. Kissinger and the Government point to a passage in the House Report which indicates that the Disposal Act was intended to "place the responsibility in the first instance upon the agencies for determining what documentary materials should and what should not be preserved . . ." H.R. Rep. No. 559, *supra*, at 1.

This statement, however, does not say that agencies will have the power to define which documents are "records." It merely says that they will have the initial responsibility for determining which documents will be preserved—a responsibility conferred by those provisions of the Records Act which contemplate that disposal recommendations for unneeded "records" will first be made by individual agencies and then forwarded to GSA for review. Indeed, the Report's recognition that preservation decisions will be made by the agency "in the first instance" implies that final authority for those decisions rests elsewhere, *i.e.*, with GSA. As discussed in the text, GSA could not exercise that power if individual agencies were free to exclude whole categories of documents from the definition of "records."

The dividing line between these "non-record materials" and "records", it should be stressed, is not a matter for agency discretion. The defining feature of "non-record materials" is that they are so devoid of value as evidence of government activities that the statutory scheme for records disposition can be bypassed without any risk of harming GSA's archival program. If a document has potential significance as a record of government business, the agency cannot declare it a "non-record" and permit an employee to destroy or remove it upon his retirement; rather, the agency must treat the document as a "record" and process it in accordance with the statutory requirements for records disposition.

Significantly, GSA agrees with this broad construction of 44 U.S.C. § 3301.[38] It has advised that "materials made or received either in pursuance of Federal law or in connection with the transaction of public business . . . [are] official record[s] subject to the provisions of Federal law pertinent to the maintenance and disposal of such records." A. 159a. Based on a careful review of federal records statutes, the National Study Commission on Records and Documents of Federal Officials shares this view.[39] It has concluded that, under

[38] As the expert agency charged by Congress with implementing the federal records statutes, GSA's contemporaneous construction of the definition of "records" is entitled to substantial weight. *Udall* v. *Tallman*, 380 U.S. 1, 16, *reh. denied*, 380 U.S. 989 (1965). Certainly, GSA's interpretation is more authoritative than that of the State Department's Legal Adviser, who has no special expertise or responsibility with respect to the Records Disposal and Federal Records Acts.

[39] Mr. Kissinger's Brief gives the impression that the Commission concluded that present law does not classify all documents relating to public business as "records." According to Mr. Kissinger, the Commission therefore urged that the statutory definition of "record" be broadened and that this broadened definition be implemented prospectively. Kiss. Br. 45. In fact, however, the Commission supported new legislation only in connection with White House, Congressional and judiciary records. National Commission, *Final Report*, 10-14 (1977). The Commission found that existing records statutes were sufficiently broad in scope to safeguard the official documents of other Executive Branch officials. *Id.* 96-97.

current law, "[a]ll documentary materials produced or received by appointed officials and concerning official agency business are Federal records, and are subject to all laws and regulations applying thereto."[40]

The contrary interpretation of 44 U.S.C. § 3301 proposed by the Government[41] and Mr. Kissinger would violate the rule that Congress normally intends to retain "long-established and familiar principles" in creating new statutory requirements. *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952). As described above, it is a basic and widely-applied doctrine that documents produced in the course of public business are official documents which the government controls. One would expect Congress to employ unambiguous statutory language if it intended to depart from that principle and authorize individual agencies to reclassify particular documents relating to agency business as the private papers of agency officials. Yet there is no provision in the Federal Records Act which suggests an intent to overturn the common law rule that official documents are owned by the government. Nowhere does the Records Act mention a class of documents other than "records" or specify how such

[40] National Commission, *Final Report* 96-97 (1977).

[41] The Government has chosen to advocate an interpretation of 44 U.S.C. § 3301 which differs from GSA's. The Government's Brief appears to concede that it has departed from GSA's construction of the statute. Gov. Br. 23.

documents should be defined. And while the Act creates elaborate procedures for disposing of "records", it offers no guidance at all on the procedures and criteria for disposing of documents that relate to agency business but fall outside the "records" category.[42] It is hard to believe that Congress gave agencies discretion to create an indefinite and potentially sweeping class of "non-records", yet failed to identify those materials or provide standards for their use and disposition.

Moreover, if individual agencies were free to exclude large classes of documents from the "records" category, there would be two definitions of "records"—one under the FOIA and another under the records statutes. The FOIA was intended to require disclosure of "*all materials* of the government,"[43] and thus is based on a broad concept of "records" which includes virtually any document created in the course of transacting government business.[44] When the FOIA was adopted, however, Congress did not indicate that it was expanding the definition of "records" which it had included

[42] The absence of such guidance makes sense if "non-record materials" are limited to documents which have no possible evidentiary or archival value. It is understandable that Congress would have little interest in the procedures by which such documents are disposed of. It is much less believable, however, that Congress would be unconcerned about the procedures for discarding documents of genuine governmental importance.

[43] S. Rep. No. 1219, 88th Cong., 2d Sess. 15 (1964) (emphasis added).

[44] If "non-record materials" had the narrow definition which we propose above, it would not cause severe harm if they were excluded from the FOIA's coverage. On the other hand, a broader definition of "non-record materials," which includes a large number of documents that reflect government business, could cause immense damage to the FOIA's objectives if such a definition were used to limit the scope of FOIA disclosure.

in the Records Disposal Act fifteen years earlier. Indeed, the FOIA does not define the term "records" at all—evidence that Congress believed its earlier definition was sufficient and did not require modification.[45] It would be most anomalous if Congress expected federal agencies to follow radically different definitions of "records" under the FOIA and the records statutes, yet provided neither statutory language nor legislative history that expressed this intent.[46]

Most importantly, the basic records disposal scheme created by Congress could not function effectively if individual agencies had discretion to exclude broad classes of official documents from the statutory definition of "records." The premise underlying the statutory procedure for records disposition is that one agency, GSA, will have ultimate responsibility for determining which records have enough importance to be permanently retained. For example, according to the Senate Report, a major purpose of the Federal Records Act was the "creation of a central staff and service agency with responsibility for leadership in the field of records management." S. Rep. No. 2140, 81st Cong., 2d

[45] Not surprisingly, a number of agencies, including the State Department, have used 44 U.S.C. § 3301 to define "records" for purposes of the FOIA. *E.g.*, 22 C.F.R. § 6.1(b); *see also* 41 C.F.R. § 105-60.103(a). The Justice Department and at least one court have also adopted this approach. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, 23 (1967); *Nichols* v. *United States*, 325 F. Supp. 130, 134 (D. Kan. 1971), *aff'd* 460 F.2d 671 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972).

[46] When identical terms are used in different statutes, they are usually accorded the same meaning, particularly when there is no evidence of a legislative intent to construe them differently. *Marks* v. *United States*, 161 U.S. 297 (1896); 2A *Sutherland on Statutory Construction* § 51.02 (4th ed. Sands 1973).

Sess., 1 (1950). Similarly, the House Report on the Records Disposal Act's predecessor statute stresses GSA's pivotal role in making archival determinations for all documents produced by the government:

> "The Archivist and his staff of trained and experienced examiners, with their combined knowledge of all Federal records, are eminently qualified to determine the value and interest of all records of the Government. The head of any agency of the Government should be able to determine the value and interest of records of that particular agency; however, he seldom has the necessary knowledge or facilities for determining whether the records of that agency are, or may become, of interest or value to another agency, or to other agencies, of the Government. The Archivist, on the other hand, being concerned with, and having a knowledge of, the records of all Government agencies, is in a position to determine whether records submitted for disposition by one agency are, or are likely to become, of value to another agency." H.R. Rep. No. 838, *supra,* at 3.

This government-wide authority over records disposition would be eroded if, under the guise of redefining the term "records", individual agencies allowed employees to remove documents relating to public business without any GSA review. In this event, valuable documents generated in the course of government activities could be excluded from the archival process simply because the agency had decided that they constitute "personal" papers rather than "records." No matter how important these documents might be, they would be exempt from the statutory procedure for records disposition, and thus could be removed from agency custody without agency records officers or NARS archivists ever determining whether their permanent

retention would benefit the government or general public."

For these reasons, the only construction of 44 U.S.C. § 3301 consistent with the effective operation of the federal records statutes is to define "records" to include *all* documents (1) created in connection with the transaction of official business and (2) providing evidence of the agency's policies, decisions, operations or activities. Once materials fit this description, it should then be the function of agency record officers and GSA archivists to review the documents for disposal or retention in accordance with the criteria for preservation in 44 U.S.C. § 3303.

This approach will not burden agencies with a mass of unwanted paperwork or prevent them from exercising selectivity in retaining the documents which their employees create. Large numbers of documents which government employees generate on a day-to-day basis will lack any evidential value and will be eligible for immediate destruction as "non-record materials." Moreover, once a document has "record" status, an agency has no obligation to retain it indefinitely. The document can be disposed of at any time, provided only that the statutory procedures for records disposi-

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[47] The undesirable consequences of bypassing the statutory procedure for records disposition have been underscored by the General Counsel of GSA:

> "[A] federal official may not conclusively establish a document as a personal paper, although its subject matter relates to official business, by merely designating it as personal, filing it separately, or withholding it from circulation. Were that the intent of Congress in enacting the Federal Records Act, the Freedom of Information Act, and related legislation, some of the most significant documents reflecting the conduct of public business would never be subject to public scrutiny." A. 112a.

tion are observed. Indeed, a variety of mechanisms are now utilized under the Records Disposal Act to provide for the routine destruction of large quantities of records without document-by-document review.[48] Accordingly, a broad construction of 44 U.S.C. § 3301 will implement Congress' intent by insuring consistency and uniformity in federal document disposal practices without creating any risk of administrative chaos.

b. The Presidential Records Act of 1978

Last year, Congress enacted the Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U:S.C. §§ 2202-2207). This statute overturns the longstanding custom of treating Presidential records as the personal property of the President and places such records on the same footing as the records produced by all Executive Branch officials. Significantly, the Act defines Presidential "records" in broad terms that encompass all documents which relate to official business and specifically provides that these records cannot be destroyed or disposed of without the written consent of the Archivist. Since the Act is explicitly patterned on the record maintenance and disposal statutes which apply to other Executive Branch officials, it provides important evidence of how Con-

[48] For example, under 44 U.S.C. § 3303(3), GSA may issue schedules which, for particular agencies, provide for the destruction of designated classes of documents after specified periods of time without further archival review. Under 44 U.S.C. § 3303a(d), which was added to the statute in 1976, GSA may now exercise this power with respect to records "common to several or all agencies." Pursuant to these provisions, numerous categories of State Department records are routinely disposed of at set intervals ranging from a few months to several years without additional GSA review. *See* Appendices A and B of the Department's *Records Management Handbook* (1977).

gress construes the definition of "records" in 44 U.S.C. § 3301.

At 44 U.S.C. § 2202, the Act provides that the "United States shall reserve and retain complete ownership, possession, and control of Presidential records." The term "Presidential records", in turn, is defined by 44 U.S.C. § 2201(2) as:

> "*documentary materials . . . created or received* by the President, his immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise and assist the President, *in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.*" (Emphasis added.)

Coupled with this broad definition of "Presidential records" is a correspondingly narrow definition of "personal records" which the President and his aides may retain upon leaving office. 44 U.S.C. § 2201(3) provides that:

> "The term 'personal records' means *all documentary materials,* or any reasonably segregable portion thereof, *of a purely private or nonpublic character which do not relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.* Such term includes—
>
> > '(A) *diaries, journals or other personal notes* serving as the functional equivalent of a diary or journal *which are not prepared or utilized for, or circulated or communicated in the course of, transacting Government business;*

"(B) *materials relating to private political associations, and having no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President*; and

"(C) *materials relating exclusively to the President's own election to the office of the Presidency*; and materials directly relating to the election of a particular individual or individuals to Federal, State, or local office, *which have no relation to or direct effect upon the carrying out of constitutional, statutory, or other official or ceremonial duties of the President.*" (Emphasis added.)

Taken together, these two provisions establish the broad principle that only materials which have no relation to or effect on the President's official duties can be considered his "personal papers."

The legislative history concerning the Act's definition of "Presidential" and "personal" records is revealing. According to the House Report, "Presidential records" are all documents "created by future Presidents and their staffs in the course of discharging their official duties", while "personal records" are "those materials which are neither developed in connection with nor utilized during the transaction of Government business." H.R. Rep. No. 95-1487, 95th Cong., 2d Sess. 3 (1978). Moreover, the Report notes, "the volume of truly personal material is considered minuscule." *Id.* at 12.

Underlying the Act's dichotomy between personal and official materials is a concept of "records" which is applicable to all government officials. During hearings on the proposed legislation, "witnesses were in general harmony that that which is generated, created,

produced or kept by a public official in [the] administration and performance of the powers and duties of a public office belongs to the Government and may not be considered private property of the individual." *Id.* at 8. Moreover, the House Report reflects a clear belief that this principle already applied to other federal officials by reason of the Federal Records Act. According to the Report, the new statute

> "relies heavily on the definition of the term 'record' in 44 U.S.C. section [3]301 and the practice that has evolved in the administration of Chapter 29 of that title. To the extent that certain categories of documentary materials are not considered to be records under that chapter, the same categories of materials generated or received by the President and his aides would generally also fall outside the ambit of what constitutes a record." *Id.* at 10-11.

The Presidential Records Act does not empower the President and his aides to exclude some official materials from the definition of "records" and thereafter to remove those materials from government custody whenever they see fit. Instead, the Act emphasizes the Archivist's pivotal role in determining which Presidential materials will be preserved. Under 44 U.S.C. § 2203 (f)(1), when a President leaves office, the Archivist will "assume responsibility for the custody, control, and preservation" of *all* Presidential records. No records can be retained in the President's discretion, and under 44 U.S.C. § 2203(f)(3), the Archivist may dispose of particular records only if they are determined to have "insufficient administrative, historical, informational or evidentiary value to warrant their continued preservation."

The President's ability to dispose of unwanted records is no greater during his term of office. Under 44 U.S.C. § 2203(c), the President may remove or destroy records that "no longer have administrative, historical, informational, or evidentiary value" only if he has obtained the written views of the Archivist and he does not object to the proposed disposition. In the event that the Archivist has such an objection, the President must submit a records disposal schedule to the Congress, which then has sixty days to take action.

The House Report emphasizes the parallel between these procedures and existing statutory mechanisms for disposing of federal records. As it states, the House Committee "felt [it] important that once having declared the President's papers to be Government records, they be governed to the extent feasible by the same statutory standards controlling Cabinet members' records and all other Government records." H.R. Rep. No. 95-1487, *supra,* at 8. Moreover, the Report also points out that the "records schedules to be filed with the Congress are to follow the model of schedules currently filed with the Archivist by Federal agencies pursuant to Title 44", and that the requirement of archival review is "based on the maxim that 'those closest to the making of history are often the least able to judge the significance of their actions.' " *Id.* at 13.

In sum, the Presidential Records Act of 1978 defines "records" as all documents relating to official business and forbids their removal from government custody without prior review by the Archivist. When Congress enacted these requirements for the preservation of Presidential records, it did not enact similar requirements for the records of other federal officials because it clearly assumed that they were already

embodied in existing federal records statutes. Thus, the Presidential Records Act confirms that 44 U.S.C. § 3301 reaches *all* documents that are created in the course of public business and provide evidence of agency functions and activities.

c. GSA Regulations

If it is possible to exempt documents relating to official business from the definition of "records" in 44 U.S.C. § 3301, the power to grant such exemptions resides solely with GSA, not individual agencies. As amended, 44 U.S.C. § 2904 expressly authorizes the Administrator of GSA to "promulgate standards, procedures, and guidelines with respect to records management." [49] And under 44 U.S.C. § 2905, the Administrator is required to "establish standards for the selective retention of records of continuing value." [50]

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[49] Prior to the Federal Records Management Amendments of 1976, Pub. L. No. 94-575, 90 Stat. 2723, 44 U.S.C. § 2910 provided that GSA would have "final authority in matters . . . involving disposal practices in Federal agencies." The replacement of this provision with a broad authorization for GSA to promulgate standards relating to records-management (44 U.S.C. § 2904) does not signify any weakening of its power. As the Senate Report on the 1976 Amendments explains, the new provision "expands and further clarifies the role of the Administrator with respect to . . . records disposition." S. Rep. No. 94-1326, 94th Cong., 2d Sess. 5 (1976).

[50] The legislative history of this provision demonstrates that it was intended to authorize GSA to designate classes of documents which all agencies would be required to preserve:

> "This subsection requires the Administrator to establish standards for the guidance of federal agencies in determining the classes and types of records that should be retained and those that should be disposed of; and to assist agencies in the application of such standards." H. Rep. No. 2747, 81st Cong., 2d Sess. 13 (1950).

Based on these and other statutory provisions, the General Counsel of GSA has advised that "every agency head shall operate the agency's records management program in full cooperation with and under regulations prescribed by GSA." A. 105a. Indeed, the State Department's own records management regulations recognize that the guidelines promulgated by GSA "apply to all federal agencies" and "establish the basic procedures and standards applicable to records and paperwork management." 5 FAM § 411.4. As the legislative history of the Federal Records Act states, "[t]he heads of the federal agencies . . . would be *required* to observe standards and principles laid down by the Administrator of General Services, within his authority." 96 Cong. Rec. 11096 (1950) (emphasis added).[51]

GSA regulations provide that documents can be removed by retiring employees only when they are "[p]apers . . . of a private or non-official character which pertain only to an individual's personal affairs", 41 C.F.R. § 101-11.202-2(d). Moreover, GSA requires all portions of personal papers "that pertain to official business" to be extracted and included in agency files. *Id.* Recently, GSA has emphasized that the "definition

[51] GSA's power to prescribe uniform record-retention standards for all federal agencies is evident in other provisions of the Federal Records Act. 44 U.S.C. § 3105 requires each federal agency to establish safeguards against the removal or loss of records. Significantly, these safeguards must include all procedures "required by regulations of the Administrator of General Services." Similarly, 44 U.S.C. § 3102 requires each federal agency to establish an "active, continuing program for the economical and efficient management of the records of the agency." This program, too, must be in compliance with all regulations that the Administrator has issued. 44 U.S.C. § 3102(3).

of personal papers covers materials pertaining solely to an individual's private affairs." Accordingly, GSA has advised, "correspondence designated 'personal', 'confidential', or 'private', etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of federal law pertinent to the maintenance and disposal of such records." According to GSA, "official records are public records and belong to the office rather than the officer." GSA Bulletin FPMR-B-65. A. 159a.

GSA regulations distinguishing between "records" and "personal papers" are no different from the regulations of the Department of State. But were there any conflict, the Department's regulations would necessarily have to yield to GSA requirements, which are binding throughout the federal government and will override contrary regulations that individual agencies may adopt. GSA's government-wide definition of official records includes *all* documents that are prepared in the course of official business and provide evidence of agency activities and transactions. Under this definition, the transcripts of Mr. Kissinger's telephone conversations plainly constitute "records" of the Department of State.

d. Practices of Other Agencies

Universally, the various federal agencies have observed the principle that documents which are created in the course of transacting government business and provide evidence of agency activities are official "records" and can only be disposed of in accordance with the procedures for records disposition established by Congress. While these agencies have recognized a narrow class of "non-record materials", they have limited

these materials to documents which have no possible value as evidence of agency functions and operations.

The Department of Defense directs its senior officials that "the removal of classified documents or those pertaining to public business is prohibited by law." A. 217a. Under Department procedures, the only documents that retiring employees may retain are "diaries, logs, memoranda of personal telephone calls, etc., which do not contain reference to official business." *Id.* Whenever Defense Department officials receive or create documents of a mixed character, the Department directs that *all* official material should be excerpted from the personal correspondence and made a part of the official file." *Id.* (Emphasis added.) The Department considers it particularly important to avoid removing ostensibly personal papers that contain "classified or privileged information." A. 219a.

The Department of the Navy has advised presidential appointees that, under 44 U.S.C. § 3301, official records are any documentary materials "made or received . . . in connection with the transaction of public business." A. 224a. According to the Department, "some evidence or information concerning these matters is contained in practically all documents received or created [and] hence, these documents should not be removed . . . ." Department policy also forbids the removal of documents containing classified information. *Id.* The Department permits "papers that are purely personal" to be retained by retiring officers. However, to qualify as personal, these materials must be "papers, such as correspondence and notes, received and originated or signed by the official essentially as a private citizen, in contrast to those he receives or signs as an agency official." A. 226a. The Department also accords

personal treatment to "diaries, provided the diary is not in fact a collection of government documents and information." *Id.*

The Department of the Interior has determined that "[r]ecords made in connection with the transaction of public business or pursuant to law belong to the Government, not to any individual officer or employee." A. 236a. Such documents are to be identified by the "statutory definition of 'records' " and "may be disposed of only in accordance with the statute and applicable records control schedules." *Id.* Like other agencies, the Department has recognized that "papers which are clearly personal may be removed." *Id.* Falling into this category are such items as office diaries, notes and logs. However, the Department has stressed that "even the work papers of government officials are records subject to the Act." A. 237a. Thus, "in the case of papers containing both personal and official matter, extracts are to be prepared of the official portions." A. 236a. Moreover, the Department forbids the "physical retention of classified national security information by any individual upon retirement or other termination from the Department." A. 238a. The Department has indicated that it will review the "personal" papers of a departing official to assure that they do not contain official information that should be preserved in Department files. A. 237a.

The Department of the Treasury has adopted an approach "which regards any record created or received in the course of official duties as official." [52] Depart-

[52] Memorandum of the Department of the Treasury to the National Study Commission on Records and Documents of Federal Officials 3 (1976).

ment policy provides that national security information "may not be removed under any circumstances" and the Department reviews the papers of outgoing officials to insure that this policy is enforced.[53] The same principles were observed by the Ford Administration in disposing of White House records after President Ford left office. According to a memorandum of Presidential Assistant Phillip Buchen, departing White House aides were only allowed to retain "purely personal files and materials" and were specifically instructed that "[p]ersonal files *do not* include any copies, drafts or working papers that relate to official business or the campaign." (Emphasis in original). A. 164a.

These agencies have classified two types of documents as "non-record materials" that may be destroyed or removed without archival review: (1) documents which are wholly ministerial and do not contain substantive information about agency activities, and (2) documents which represent the personal work product of agency employees and thus do not reflect the actual transaction of agency business. GSA regulations, for instance, cite "preliminary worksheets" as an example of "non-record materials" [54] and, in 1972, GSA advised that such materials could include "working drafts and notes", "notebooks", "appointment calendars" and office "directories." A. 262a. Similarly, the Department of Defense has determined that "non-record materials" include "materials that have no documentary or evidential value", including "working papers" and "preliminary or intermediate drafts" which have "no informational value once action has been completed

[53] *Id.* at 1.

[54] 41 C.F.R. § 101-11.401.3(d).

since they do not relate to significant steps taken in preparing record copies of documents." A. 222a.[55]

To the same effect are Office of Management and Budget guidelines under the Privacy Act which provide that "records" do not include notes and papers that are "uncirculated" and "over which the agency exercises no control or dominion (*e.g.*, personal telephone lists)." 40 Fed. Reg. 28948, 28952 (July 9, 1975). This approach is embodied in *Porter County Chapter of the Izaak Walton League* v. *AEC*, 380 F. Supp. 630, 633 (N.D. Ind. 1974), which holds that uncirculated, handwritten documents which represent solely the thought processes of government employees are not "records" under the FOIA.

The differences between "non-record materials" and the transcripts of official conversations at issue here are

[55] A number of state public records statutes define "non-record materials" in similar terms. The 1971 New York law, for example, exempts "[l]ibrary or museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience or reference, and stocks of publications and of processed documents." N.Y. [Educ.] § 142(c) (McKinney 1978). The Minnesota statute adds to the nonrecord category "data and information that does not become part of an official transaction." Minn. Stat. Ann. § 138.17 (West 1979). Under the Maryland Act, "acceptances or refusals of invitations or engagements and other personal business of public officials" are nonrecord materials. Md. Code Ann. art. 54 § 9 (1976). The Oregon statutes covering public records, among the most detailed in the country, provide for the disposition of the following material without "specific authorization": (1) inquiries and requests from the public; (2) public records which are duplicates "by reason of their having been photocopied"; and (3) "letters of transmittal and acknowledgment, advertising, announcements and correspondence or notes pertaining to reservations of accommodations or scheduling of personal visits or appearances." Or. Rev. Stat. 3192.170 (1977).

dramatic. The transcripts are not handwritten materials prepared by an official solely for his own use and reflecting his private thought processes. Nor are they ministerial documents (like office directories) containing no substantive information about agency activities. Rather, they are typed documents, prepared by government secretaries using government monitoring equipment, that record actual conversations between Mr. Kissinger and other high officials concerning affairs of state. Moreover, the transcripts were used by Mr. Kissinger and his aides to facilitate the transaction of State Department business. Thus, the transcripts both document actual Department activities and operations and were used as evidence of those activities and operations by Department employees at the time they were made. Given these factors, the lower courts properly concluded that the transcripts were official "records" under 44 U.S.C. § 3301 and that they were removed from the Department in violation of the Records Disposal Act's procedures for records disposition.

2. State Department Regulations Classify the Transcripts as Official "Records"

Mr. Kissinger insists that, under State Department regulations, documents created in the course of a Department employee's official duties will be treated as private papers merely because the employee filed them as "personal" when they were prepared. If Mr. Kissinger is correct, an employee's unilateral determination that documents are "personal" would be sufficient to justify their removal from the Department, and no further review of their status by Department or NARS record officers would be permitted. This extraordinary

theory is contradicted by the very State Department regulations on which Mr. Kissinger relies. In accordance with 44 U.S.C. § 3301 and GSA requirements, these regulations provide that *all* documents which relate to official business and provide evidence of agency activities are Department records and must remain in its files until the statutory procedures for records disposition have been observed.

a. The Department's Definition of Personal Papers

5 FAM § 432 provides as follows:

> "*Papers of a personal character which pertain only to an individual's private affairs* and which are kept in the office of a Departmental or post employee are to be clearly designated as personal. They are to be filed separately from the official records of the office at all times." (Emphasis added).

Under this provision, Department employees may only designate documents "personal" if they are "papers of a personal character which pertain only to an individual's private affairs." When documents relate to the business of the Department, personal designation is improper. 5 FAM § 417.1(a)[56] prohibits retiring Department employees from removing papers which are kept in their offices without the approval of the Director of the Department's Document Center. The only ex-

[56] This provision in its entirety requires as follows:

> "No papers kept in an employee's office that have not been explicitly designated or filed as personal at the time of origin or receipt may be removed from the Department or a post when the employee resigns, transfers to another Federal agency, or is otherwise separated from the Department or the Foreign Service, or at any other time, without the approval of the Director, Foreign Affairs Document and Reference Center."

ception to this rule is for documents "explicitly filed as personal at the time of origin or receipt." However, since "personal" designation is reserved for papers which pertain solely to the employee's private affairs, this exception does not apply to documents produced in connection with the employee's official duties. As the Department has advised, such documents are Department "records" and must remain in its files unless the Director of its Document Center has expressly authorized their removal. A. 203a.

The Department's *Records Management Handbook* (1977) confirms that personal files cannot include documents which relate to official business. ¶ 188 of the *Handbook* defines "personal files" as "[f]iles maintained by an officer pertaining only to his personal affairs." As the *Handbook* advises, "[o]ffice working files, preserved by an officer to document his assigned responsibilities in the Department or at a post, are not considered personal files." *Id.* Moreover, personal files cannot be intermingled with job-related materials. ¶ 273 of the *Handbook* emphasizes that "[p]apers of a purely personal nature pertaining to an employee's private affairs must be maintained separately from the working files relating to his assigned responsibility . . . ." [57]

[57] A recent study of the State Department's records system, prepared for the National Commission on Records and Documents of Federal Officials, reports that the Department's Historical Office considers "personal papers" to include "texts of speeches, calendars, appointment books, newspaper clippings, invitations, menus, etc." According to the author, "[e]ssentially everything else is official", including diaries, which the office regards as "records of official acts." A. Nelson, *Foreign Policy Records and Papers*, a paper prepared for the National Study Commission on Records and Documents of Federal Officials 55-56 (1976).

Other Department regulations confirm that documents relating to Department business are subject to official control and must remain in Department files when individual employees retire. For example, 5 FAM § 417.1(c) provides that:

> "Unclassified documents *relating to the performance of an employee's official duties* may be copied and privately retained by an employee if approved by the Director, Foreign Affairs Document and Reference Center." (Emphasis added).

If original documents "relating to the performance of an employee's official duties" could be removed merely by designating them "personal", then this provision—which requires official authorization before *copies* of such records can be removed—would be meaningless.

Similarly, under 5 FAM § 432, even when documents have been properly designated and filed as personal, retiring employees must extract and leave in Department files *all* materials that pertain to official business:

> "When official policy matters are discussed in personal correspondence, *that portion pertaining to functions or activities of the Department* or a post is to be extracted and made a part of the official records." (Emphasis added).

This extracting requirement does not permit retiring employees to select which portion of a "personal" document the Department will retain. *All* parts of the document which concern Department affairs must be incorporated in its "official records." This insistence on full extracting of official matter reflects the Department's policy of "maintain[ing] exclusive control over all records of Department business." As the Department has explained, "until such official material is ex-

tracted for the Department's records, the Department has a predominant interest in the paper that is otherwise personal." A. 204a.

To enforce these policies, 5 FAM § 417.2 provides that all departing Department officials must sign a separation statement designated "JF-3." JF-3 requires each retiring employee to attest that he has "surrendered to responsible officials all unclassified documents and papers relating to the *official business of the Government* acquired by [him] while in the employ of the Department. . . ." (Emphasis added). A. 255a. This pointed injunction against removing *any* official information directly contradicts Mr. Kissinger's claim that Department employees may retain any document concerning official matters that they have designated "personal." [58]

In addition to establishing the Department's control over all official documents which its employees produce voluntarily, Department regulations provide that certain classes of documents *must* be created and included in official files. Among these documents are full records of every telephone conversation "of any significance":

> "Decisions, commitments, and discussions of any significance which are oral in nature (for example, person-to-person, by telephone, in staff meetings, or in conferences) must be made a matter of record. The information should be written in the form of aides-memoire, memorandums of conversation, or memorandums to the file." 5 FAM § 423.2-1.

[58] Mr. Kissinger in fact signed a Form JF-3 before leaving Department service. A. 255a.

This regulation does not, it is true, specify any particular format for documenting official telephone conversations. However, Mr. Kissinger has never demonstrated that, apart from maintaining transcripts, he made *any* systematic effort to document his telephone conversations—much less documented all conversations of "any significance" as 5 FAM § 423.2-1 requires.[59] Moreover, Mr. Kissinger has acknowledged that he and his aides used the transcripts to insure adequate follow-up actions on his telephone discussions; this would appear to be the precise purpose for which the Department requires that a record of those discussions be kept.

Thus, the transcripts represented Mr. Kissinger's mechanism for complying with the documentation requirement of 5 FAM § 423.2-1. That the transcripts were prepared to satisfy Department regulations demonstrates that the Department affirmatively classified them as its "records". This classification is the clearest possible evidence that the transcripts were not "personal papers" which the Department permitted Mr. Kissinger to remove from its files.

[59] Mr. Kissinger does suggest that there are other documents which reflect the substance of certain telephone conversations. For example, he points out that the RCFP and MAP FOIA requests sought all written records of Mr. Kissinger's conversations—telephonic and otherwise—and that these requests were denied on the ground that such records constitute "a very large and undifferentiated volume of material." A. 56a, 57a, 71a, 79a. *See* Kiss. Br. 5. It goes without saying that, during his five years as Secretary of State, a large volume of materials was prepared that reflect some of the many person-to-person meetings, formal negotiations, conferences and telephone conversations in which Mr. Kissinger participated. The existence of these materials, however, hardly establishes that memoranda were prepared of *every* telephone conversation of *any* significance, as 5 FAM § 423.2-1 required.

b. The Protection of Classified Information

Mr. Kissinger's claim that the transcripts were "personal papers" clashes with another important Department policy: the Department insists on retaining all documents which contain classified information.

When Mr. Kissinger was Secretary of State, the classification of national security information throughout the federal government was controlled by Executive Order 11652, issued on March 8, 1972. 3 C.F.R. 678 (1971-1975 Compilation).[60] Section 6 of this Executive Order establishes policies for limiting the dissemination of classified information. One of these policies is that "[c]lassified information and material shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons." 3 C.F.R. 686. Another policy is that "[c]lassified information and material no longer needed in current working files or for reference or record purposes shall be destroyed or disposed of in accordance with the records disposal provisions contained in Chapter 33 of Title 44 of the United States Code." *Id.*[61]

In interpreting its responsibilities under this Executive Order, the Department has forbidden retiring em-

[60] On June 28, 1978, President Carter issued Executive Order 12065, 43 Fed. Reg. 28949 (July 3, 1978), which prescribes new standards and procedures for the classification of national security information.

[61] These policies were implemented by a National Security Council Directive issued on May 17, 1972. 3 C.F.R. 1085 (1971-1975 Compilation) This Directive prescribes stringent physical requirements for facilities where classified information is stored and imposes strict limitations on the persons to whom such information can be disclosed.

ployees to retain *any* document which contains classified information. As the Department has explained:

> "[I]rrespective of whether official matters have been extracted from a paper containing personal material, the Department has a predominant interest in the storage of a paper containing classified information. The Department has final authority over how and where *all* papers held by Department employees and containing classified information are kept." A. 204a (emphasis in original).

This Department policy is rooted in a 1959 Cabinet Paper issued during the Eisenhower Administration. Construing the predecessor of Executive Order 11652, this Paper concluded that classified information "should not be removed from the custody, control, or possession of any Department, agency, or person charged with its protection, and title to such material may not be transferred from the United States."[62] In

[62] Removal of Records by Retiring Department and Agency Heads, White House Cabinet Paper, July 27, 1959, at 3.

At the same time, the Cabinet Paper advised that extra copies of documents which contain classified information may be removed from government custody if procedures are instituted to protect their confidentiality and title to the copies remains in the United States until the information has been declassified. *Id.* at 5.

It was in accordance with this basic approach that Mr. Kissinger transferred copies of certain Department records in his working files to the Library of Congress pursuant to the First Agreement. Under that Agreement, copies of government papers cannot be moved to the Library until they have been reviewed by Department officials to assure that original or record copies are retained in Department files. A. 43a. In addition, no government papers can be made available to the public until the Department has determined that they lack classified information, and no person may have access to classified papers unless he has an appropriate security clearance. A. 43a-44a. As a final precaution, Department security officials were required to inspect the storage

accordance with this requirement, the Department's Separation Statement requires each retiring employee to affirm that:

> "I have surrendered to responsible officials all classified or administratively controlled documents and material with which I was charged or which I had in my possession, and *I am not retaining* in my possession, custody, or control, documents or material containing classified or administratively controlled information furnished to me during the course of such employment or developed as a consequence thereof, including *any diaries, memorandums of conversations, or other documents of a personal nature that contain classified or administratively controlled information.*" A. 255a (emphasis added).

Thus, the Department's position is that *no* document (business or personal) which contains classified information can be removed from its files.

The Department attempts to maintain control over classified information by a "senior official rule" which was adopted in 1960 and is embodied in 5 FAM § 946. Under this rule, former presidential appointees may be authorized access to classified information concerning their Department duties which is located in Department

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facilities at the Library where copies of Department records were to be kept and determine that these facilities were appropriate for maintaining classified documents. A. 253a.

Significantly, these precautions are inapplicable to the transcripts of Mr. Kissinger's conversations. Since these transcripts are classified as "personal papers" under the First and Second Agreements, Mr. Kissinger is not prevented from disclosing their contents to the general public, even if they contain classified information, or from showing them to persons who lack appropriate security clearances.

files.[63] The objective of this procedure is to persuade senior officials to leave documents containing classified information in the Department's control. As the Department has stressed, 5 FAM § 946 is "[o]ne of the major inducements [it] uses to insure that records are not removed." A. 204a. Prior to Mr. Kissinger's tenure as Secretary, the "senior official rule" in fact accomplished this objective. Mr. Kissinger's two predecessors, Dean Rusk and William Rogers, as well as virtually all of their top aides, left their working files in Department custody.[64]

In his eight years of government service, Mr. Kissinger unquestionably discussed classified information during his telephone conversations and such information is necessarily reflected in the transcripts.[65] Under established State Department policies and practices, transcripts containing classified information consti-

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[63] The rule also provides that, at the request of former officials, information will be reviewed for declassification. This procedure attempts to make it easier for these officials to write memoirs or otherwise explain their public actions while insuring that the Department can prevent the unauthorized disclosure of confidential information.

[64] A. Nelson, *Foreign Policy Records and Papers, supra,* at 56. *See also* A. 205a.

[65] The portions of the transcripts which Mr. Safire's FOIA request encompassed were reviewed for classified information by the Department's Council on Classification Policy, which determined that the conversations in question did not contain any classified information. A. 81a. However, so far as the record discloses, the remainder of the transcripts (a much larger body of materials) was never reviewed for classified information. As Secretary of State, Mr. Kissinger had frequent occasion to obtain and discuss sensitive diplomatic, intelligence and military information. It therefore stands to reason that Mr. Kissinger discussed classified information during *some* of his telephone conversations in government service.

tuted Department "records" and should have remained in Department files. In this respect as well, State Department requirements contradict Mr. Kissinger's claim that the transcripts were "personal papers" and demonstrate that their removal from Department custody was unlawful.[66]

c. The Extracts

After the transcripts were removed from Department custody, extracts were prepared by Lawrence Eagleburger, a close aide of Mr. Kissinger, for inclusion in the Department's files.[67] Mr. Kissinger insists that these extracts—and not the original transcripts from which they derive—represent the only "records" which the Department should have retained and that

[66] If this Court agrees that the FOIA applies to the transcripts, it is possible that the Department will later seek to withhold portions of the transcripts on the basis of FOIA exemption 1, which applies to classified national security information. We believe that there is a substantial question whether the Department can properly rely on exemption 1 after failing to take any action to prevent Mr. Kissinger from removing classified information contained in the transcripts from Department custody. This issue will need to be considered by the court below on remand. At the present stage, the significance of the Department's policies concerning classified information is principally to demonstrate that removal of the transcripts violated Department regulations.

[67] It is unclear when the extracts were deposited with the Department. The record indicates, however, that, as of January 18, 1977, preparation of the extracts was still in progress A. 90a, 94a. The Government maintains that the Department was obligated to retain the original transcripts at least until adequate extracts were prepared and included in Department files. Gov. Br. 51. While we disagree that the transcripts could be relinquished at this point, it should be noted that, under the Government's reasoning, the original transcripts should have been in the Department's files on December 28, 1976, when the MAP FOIA request was filed, and on January 13, 1977, when the RCFP request was filed.

preservation of the original transcripts was unnecessary.[68] This argument is without merit for two separate reasons.

First, under 5 FAM § 432, extracting is only permissible for "papers of a personal character", not for documents prepared in connection with the transaction of official business. The Department's Separation Statement requires Department officials to surrender all "documents and papers relating to the official business of the Government." A. 255a. Indeed, if papers contain classified information, they cannot be retained even if they are personal in character. *Id.* Moreover, while 5 FAM § 417.1c permits retiring employees to obtain official approval to remove *copies* of unclassified documents relating to their duties, the Department's regulations nowhere authorize employees to remove the *originals* of such documents. Accordingly, if "extracts" were to be prepared, it was so Mr. Kissinger could retain purely personal portions of the tran-

[68] The Government has expressed qualified agreement with this argument. While noting that the Archivist takes the position that the original transcripts in their entirety should have remained in Department files, it maintains that Mr. Kissinger could have removed those transcripts "so long as extracts were made of [their] business portion . . . for the permanent files." Gov. Br. 23, 47-49. Further proceedings are necessary, the Government argues, "to judge the extent to which the extracts adequately documented the agency business in the [transcripts]." *Id.* at 23.

As discussed in the text, we disagree that the preparation of extracts could have justified removal of the original transcripts under any circumstances. Wholly apart from this objection, moreover, we disagree that further proceedings are necessary to assess the adequacy of the extracts. As expiained in the text, the present record demonstrates that the extracts do not include the "business portions" of Mr. Kissinger's conversations in their entirety and, thus, the extracts do not satisfy the standard that the Government itself would apply.

scripts for his own files. The original transcripts were required to remain in Department custody.

Second, 5 FAM § 432 provides that, even where extracting is appropriate, it must encompass all portions of the document "pertaining to the functions or activities of the Department."[69] Similarly, under 5 FAM 423.2-1, the Department's official files must contain memoranda of all conversations "of any significance." According to the Department's Legal Adviser, however, Mr. Eagleburger was instructed to extract only those portions of the transcripts which "contain any significant policy decisions or actions not otherwise reflected in the Department's records." A. 259a. Because there is a broad spectrum of conversations that this standard would not encompass, the extracts clearly comprise but a small fraction of the official conversations in which Mr. Kissinger participated during his eight years in government.

Under the Legal Adviser's standard, the extracts would not include Mr. Kissinger's conversations with foreign and domestic officials in which no "policy decisions" were made or no official "actions" were taken. This category of conversations could involve the transmittal of important diplomatic information, the exploration of policy alternatives or the initial steps in a complex diplomatic negotiation. Moreover, even if a conversation contained a "policy decision" or "action",

[69] Thus, the Donation Procedures Memorandum, which prescribes procedures for transferring Mr. Kissinger's working files to the Library of Congress, provides that, when they encounter "any document containing both personal and official matter," Department record officers must assure that "an extract of official contents will be prepared for inclusion in the Department's record system." A. 252a.

it still would not be reflected in an extract if Mr. Eagleburger determined that it was not "significant." Depending on Mr. Eagleburger's interpretation of this term, numerous conversations recording Department decisions and actions might not have been extracted on the ground that they were simply too unimportant. Finally, even if a conversation recorded a policy decision or action that was significant, an extract still might not have been prepared if it was determined—again in Mr. Eagleburger's subjective judgment—that the decision or action was "otherwise reflected in the Department's records." Under this criterion, Mr. Eagleburger would have been free not to extract conversations in which major foreign policy decisions were made on the ground that the substance of those decisions was reflected in other Department documents.

Because of these omissions, the highly edited extracts prepared by Mr. Eagleburger represent a small and selective sampling of the official telephone discussions in which Mr. Kissinger participated as Secretary of State. Even if it is assumed that extracting was permissible to start with, Department regulations required those extracts to contain all non-personal portions of Mr. Kissinger's telephone conversations. Since Mr. Eagleburger observed a far less inclusive standard in preparing the extracts, they cannot substitute for the complete transcripts and provide no basis for removing those transcripts from Department custody.

d. The Department's Definition of "Non-Record Materials"

The only documents which the Department defines as "non-record materials" are listed in ¶ 272 of the Department's *Records Management Handbook.* These documents include "information or extra copies" of

communications; Department and other federal publications; newspaper clippings; rough drafts and working papers; other background data; and office chronological and reading files.

The transcripts fall into none of these categories. They plainly cannot be considered "rough drafts" and "working papers" since they involve not Mr. Kissinger's personal work product but records of his business communications with other United States and foreign officials which were circulated to his aides after they were prepared. Moreover, under Department regulations, even "rough drafts" and "preliminary notes" must be considered records when they "form an integral part of the finished document or show changes in policy." 5 FAM § 423.2-8. Thus, in accordance with 44 U.S.C. § 3301, the Department recognizes that materials which have some value as evidence of Department activities must be retained as "records" even if they are "rough" and "preliminary." Under this approach, the transcripts would have the status of "records" if for no other reason than because they shed great light on the genesis and evolution of Department policies and decisions.

Finally, even if the transcripts could be considered "non-record materials" and not "records", the procedures for their removal would still be unlawful in two separate respects and the transcripts would remain Department property.

First, as discussed above, Executive Order 11652 (which was in effect in 1976) provides that documents containing classified information can only be removed in accordance with the procedures established by the Records Disposal Act, and the State Department prohibits retiring employees from removing documents

containing classified information under *any* circumstances. Thus, even if the transcripts are not "records" under 44 U.S.C. § 3301, portions of the transcripts containing classified information were required to remain in Department files until the Department had complied with statutory procedures for records disposition.

Second, under 5 FAM § 417.1(a), unless a document relates solely to an employee's private affairs and was designated and filed as "personal" at the time of origin or receipt, it cannot be removed from Department custody by a retiring employee without the approval of the Director of the Department's Document Center. The transcripts were never reviewed by the Center's Director because Mr. Kissinger took the position that they were personal papers which he was free to remove without any Department authorization. Without the approval required by 5 FAM § 417.1(a), removal of the transcripts violated Department regulations even if the transcripts *could* be considered "non-record materials."

e. The "Deference" Owed to the State Department's Determinations

Even though no Department regulation classifies the transcripts as personal papers, Mr. Kissinger strenuously asserts that the Department "determined" that they had this status and urges that this "determination" should be accorded deference by the courts. Kiss. Br. 39-41. In fact the "determination" on which Mr. Kissinger relies was made not by the Department but by its Legal Adviser, and occurred under highly irregular circumstances which severely limit the weight it should receive. The transcripts had already been removed from Department custody when the Legal Adviser concluded that they were personal papers, the

basis for this conclusion was never articulated intelligibly, and the Department has never defended the Legal Adviser's construction of its regulations in the courts.

The transcripts were removed from the State Department on October 29, 1976. Prior to that removal, transcripts from Mr. Kissinger's State Department period were never reviewed by the Director of its Document Center or the Legal Adviser, and there was no formal determination that they were Mr. Kissinger's personal papers.[70] The Legal Adviser first issued a written opinion that the transcripts had this status on November 11, 1976, two weeks after they had been delivered to the Rockefeller estate. This opinion, however, contains virtually no analysis of pertinent Department regulations. And while the Legal Adviser's conclusions are reiterated in his denials of the MAP and RCFP FOIA requests on January 18 and 28, 1977, these denials do not cite or discuss specific Department regulations. A. 61a, 73a. Thus, the Legal Adviser's opinions cannot be considered an impartial and carefully reasoned inter-

[70] Portions of the transcripts from Mr. Kissinger's White House period were reviewed in connection with the Safire FOIA request. However, this request was denied on the ground that the transcripts in question were exempt from FOIA disclosure as the work product of a presidential assistant. A. 172a-173a. Whether the transcripts of Mr. Kissinger's conversations as Secretary of State were Department records was an issue that the Safire FOIA request did not raise. While the Legal Adviser's Memorandum of November 11, 1976 refers to previous oral advice provided in connection with that request, there is reason to believe that this advice did not involve the State Department transcripts but was limited to the transcripts of White House conversations sought by Mr. Safire. Significantly, the Justice Department has indicated that it was consulted about the Safire request solely to ascertain whether documents created by Mr. Kissinger while he was Assistant to the President were subject to the FOIA. A. 115a.

pretation of Department policies. Instead, they are best regarded as a *post hoc* rationalization for a course of action on which the Department's head, for his own reasons, had already embarked.

If formal Department policies and practices established that the transcripts were Mr. Kissinger's personal papers, one would expect the Department to defend that position in the courts. However, in the two lower courts, the Department *never* suggested that Mr. Kissinger's construction of its regulations was correct. Indeed, in this Court, the Government has explicitly disputed the Legal Adviser's analysis, arguing that "[t]he notes pertaining to agency business . . . belonged to the agency throughout Kissinger's tenure as Secretary of State."[71]

Finally, while a "reasonable" interpretation of agency regulations may be entitled to deference, no agency has any authority to violate its regulations. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954). This rule applies with special force when agency record-keeping determinations receive judicial scrutiny in suits under the FOIA. Paragraph (a)(4)(B) of the

[71] Gov. Br. 23. The only point on which the Government has suggested the Legal Adviser is entitled to deference is his conclusion that the original transcripts could be removed from Department custody if adequate extracts were included in Department files. *Id.* 47-48. However, the Government contends that this extracting process should encompass all "official matters reflected in the notes" (*id.* 47) and "the business portions of the notes" (*id.* 23)—notably more complete standards for extracting than recommended by the Legal Adviser. Moreover, notwithstanding the Legal Adviser's conclusions, the Government has emphasized that the "record does not contain any indication whether the State Department believes the extracts are sufficient for purposes of its records management program." *Id.* 49.

Act provides that, when agency records are withheld, the courts shall "determine the matter *de novo*." Thus, an agency's conclusion that documents produced by its employees are not "records" to which the FOIA applies cannot be accepted on faith. Rather, it must receive searching examination by the courts and should be accorded deference only if supported by the clear weight of reason and experience. In this case, the Legal Adviser's conclusion that the transcripts were private papers is directly contrary to the Department's own regulations governing the creation and maintenance of official records and both can and should be disregarded.

II.

THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE POWERS TO COMPEL THE RETURN OF THE TRANSCRIPTS TO THE DEPARTMENT OF STATE

The procedures prescribed by the Records Disposal Act for disposing of agency records are "exclusive." 44 U.S.C. § 3314. When those procedures have been ignored, movement of a document to a location outside agency custody cannot change its status; the document remains a "record" of the agency within the meaning of 44 U.S.C. § 3301. Since the transcripts were removed from the Department of State without adherence to the Records Disposal Act, they therefore remain Department "records". Their present location at the Library of Congress is irrelevant.

It is clear that, as Department "records", the transcripts would be subject to the FOIA if requesters had sought their disclosure while they were still in Depart-

ment custody.[72] Unknown to requesters and without any public announcement, however, the transcripts were moved to private property a matter of weeks before the FOIA requests were made. The question arises, accordingly, whether documents that leave the custody of an agency are beyond the reach of the FOIA—even though removal of the documents was unlawful, the documents remain agency "records" in every respect except physical location, and the FOIA requesters had no reason to believe that the documents had been removed when they sought disclosure.

Mr. Kissinger and the Government argue that the FOIA ceases to apply the moment a record leaves agency custody. Kiss. Br. 13-30; Gov. Br. 27-38. We disagree. This reading of the FOIA is justified by neither its statutory language nor its legislative history. If adopted, it would create a dangerous mechanism for circumventing the broad disclosure obligations that the FOIA creates. Under the FOIA, the district court had jurisdiction to invoke its equitable powers to require the retrieval of unlawfully removed records, and this was plainly a proper case for the exercise of the court's discretion.

A. The FOIA Applies to Documents That Have Been Unlawfully Removed From Agency Custody

Under the FOIA, federal agencies have an affirmative responsibility to produce all "records" requested by members of the public. 5 U.S.C. § 552(a)(3). The only records exempt from this responsibility are the nine narrow classes of documents specified in subsec-

[72] The Safire FOIA request was made while the transcripts were still in the Department's custody. This request, however, related to a limited portion of the transcripts prepared while Mr. Kissinger was a presidential assistant.

tion (b) of the Act. To insure the fullest possible disclosure of agency records, subsection (c) emphasizes that the Act "does not authorize withholding of information or limit the availability of records to the public except as specifically stated" in these exemptions.

There is no provision of the Act which relieves an agency from disclosing documents which are "records" but happen to be outside the agency's physical custody at the time an FOIA request is made. In the absence of a specific exemption for such documents, the broad disclosure duty created by subsection (c) should plainly require their production.

The Government and Mr. Kissinger urge that paragraph (a)(4)(B) of the FOIA excuses an agency from producing records that are not in its actual possession. Gov. Br. 35; Kiss. Br. 13-14. Under this paragraph, a district court

> "has jurisdiction to enjoin the agency from *withholding* agency records and to order the production of any agency records *improperly withheld* from the complainant." (Emphasis added.)

Records that the agency owns and legally controls, however, can clearly be described as "withheld" whether or not they happen to be stored on agency premises. If an agency receives a request for such records, it has the power to retrieve them and make them available under the Act. Mr. Kissinger, for example, was still Secretary of State when the RCFP requesters sought the transcripts and could easily have returned them to the Department for FOIA processing and review. Thus, when an agency refuses to regain custody over documents that are its records and remain subject to its legal control, it is "withholding" those records in violation of

the Act and the courts have jurisdiction to require an appropriate remedy.

Confirming the plain meaning of the FOIA's statutory language are its underlying policies. The FOIA is based on the premise that the public is entitled to full information about the activities and operations of government agencies. According to the Senate Report, the Act reflects a belief that "the public as a whole has a right to know what its Government is doing." S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965). These broad disclosure objectives would be nullified if the Act did not apply to records that remained in the agency's legal control but had been unlawfully removed from its physical custody.

The present FOIA derives from the public information section of the Administrative Procedure Act, 5 U.S.C. § 1002 (1964). Under this earlier legislation, agencies were permitted to withhold information "in the public interest", "for good cause shown", or on the ground that the person seeking the record was not "properly and directly concerned" with the information. Congress revised the FOIA in 1967 to eliminate the broad opportunity for suppressing official records that these standards had created. As the Senate Report summarized the abuses which had occurred under prior law:

> "Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Enumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—'requiring secrecy in the public interest', or 'required for good cause to be held confidential.' " S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

In drafting the new disclosure statute, Congress explicitly sought to limit the discretion of agency officials so there would be no opportunity for suppressing selected documents that were politically or personally sensitive. Thus, Congress provided that "any person" could seek access to any agency record, without showing a specific need for the information it contained. 5 U.S.C. § 552(a)(3). In addition, Congress imposed a sweeping disclosure requirement on the federal agencies which was limited only by nine narrowly drawn exemptions. As the legislative history emphasizes, the statutory scheme rests on a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965).

The Congressional objective of compelling the broadest possible disclosure is reflected in subsection (c) of the Act which, as indicated, declares that no record may be withheld from the public unless it is within the Act's nine exemptions. The Senate Report's explanation for this provision is revealing: "[t]he purpose of the subsection is to make it clear beyond a doubt that *all materials* of the government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in Section 3." S. Rep. No. 1219, 88th Cong., 2d Sess. 15 (1964) (emphasis added).

In construing the FOIA, this Court has consistently been mindful of its legislative history and stressed the need to interpret its disclosure requirement broadly and its exemptions narrowly. In *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 80 (1973), the Court stated that:

> "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."

In *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361 (1976), the Court reiterated these principles, stressing that the FOIA's

> "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. 'These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c) . . .,' *Mink, supra,* at 79 and must be narrowly construed." (Citations omitted.)

Only last term, the Court again emphasized that the "basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society",[73] and that the Act's "legislative history is replete with references to Congress' desire to loosen the agency's grip on the data underlying governmental decisionmaking."[74] The lower courts have consistently emphasized similar concerns in implementing the Act.[75]

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[73] *NLRB* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978).

[74] *Chrysler* v. *Brown,* No. 77-922 (April 18, 1979), slip op. 6 n.10.

[75] *See, e.g., Soucie* v. *David,* 448 F.2d 1067, 1080 (D.C. Cir. 1971) ("[t]he policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly"); *Wellford* v. *Hardin,* 444 F.2d 21, 24 (4th Cir. 1971) ("[t]he Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the government is discharging its duty to protect the public interest"); *SDC Development Corp.* v. *Mathews,* 542 F.2d 1116, 1119 (9th Cir. 1976) ("[t]he legislative history of the Freedom of Information Act discloses deep Congressional concern with the ability of the American people to obtain information about the internal workings of their government"); *Vaughn* v. *Rosen,* 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974) (the Act's "exemptions from disclosure must be construed narrowly, in such a way as to provide the maximum access consonant with the overall purpose of the Act").

The FOIA's objective of full disclosure of government information could be easily evaded if the Act ceased to apply once records owned by the agency were removed from its physical custody. Agency employees could simply take home or store with friends documents that they considered politically sensitive or personally embarrassing. Alternatively, such documents could be transferred to sister branches of the government, like the Library of Congress, to which the Act does not apply. Exactly as Mr. Kissinger has done here, stringent restrictions on access could then be imposed which shield important information about governmental activities from public view. Agency officials, unwilling to take action against offending employees or perhaps relieved that damaging information had been suppressed, could simply stand by idly without attempting to retrieve documents that had been improperly removed from agency files.

The practical effect of condoning such stratagems would be to create an additional exemption from the Act for documents that government officials and their superiors, for personal or political reasons, do not wish to disclose. By the simple expedient of removing documents from an agency's physical custody, government officials would be free to engage in precisely the kind of selective withholding of official information that prevailed before the FOIA was enacted and that the Act sought to eliminate. Contrary to the Congressional intent, the agency could refuse access to records that it owns and legally controls even though those records do not fall within the Act's nine exemptions. A "tenth exemption" would now exist for documents that agency officials had the foresight to remove from agency cus-

tody before an FOIA request for their disclosure could be filed.

The circumstances of this case graphically illustrate how the objectives of the FOIA can be circumvented by the unlawful removal of agency records. Before January 1976, when Mr. Kissinger filed interrogatory answers in *Halperin* v. *Kissinger,* the public was unaware that he had monitored and transcribed his White House telephone conversations. Moreover, it was not until November 1976, that the Department first acknowledged that Mr. Kissinger's telephone conversations as Secretary of State had also been transcribed.[76] On October 28, 1976, all of the transcripts were moved from the Department to the Rockefeller estate. However, no public announcement of this removal was ever made. Indeed, statements of a senior Department official implied that Mr. Kissinger did not intend to remove the transcripts until his term as Secretary expired on January 20, 1977. A. 86a. Understandably, therefore, the RCFP FOIA request of January 13, 1977 was based on the premise that the Department still possessed the transcripts. The requesters in fact asked the Department to retain the transcripts until legal proceedings under the FOIA had been resolved. A. 57a-58a.

Thus, this is not a case where FOIA requesters delayed in seeking access to materials that they knew the agency intended to relinquish. Information about the location (and even the existence) of the transcripts was

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[76] So far as requesters are aware, the first acknowledgment by the Department of the transcripts' existence was a statement by Lawrence Eagleburger reported in a *Washington Post* story of November 11, 1976. A. 86a.

withheld from the public, and the requesters had no forewarning that the transcripts would be removed from Department files. If the existence of the transcripts had been disclosed sooner, or if their impending removal had been publicly announced, an FOIA request could have been filed while they were still in Department custody.

Moreover, if the procedures for records disposition prescribed by statute had been observed, the transcripts never would have been removed at all, but would have remained available for production under the FOIA. For this reason, the Department's lack of custody over the transcripts is directly tied to Mr. Kissinger's violation of Department regulations and the Records Disposal Act, and to the Department's refusal to recover the transcripts after receiving requests for their disclosure. The effect of these actions was to deprive the requesters of access to governmental materials which—but for their unlawful removal from Department custody—would have been subject to the Act. The intent of Congress would be defeated if the rights of requesters were extinguished whenever records otherwise covered by the FOIA are removed by agency employees in violation of law and the agency fails to seek their return.

The removal of the transcripts circumvented the objectives of the FOIA in an even more fundamental respect. Under Mr. Kissinger's agreements with the Library of Congress, he alone controls public access to the transcripts. Particular transcripts can be withheld from anyone he considers unacceptable, for any reason which he deems sufficient. A. 44a. Moreover, when access is refused, Mr. Kissinger need not even explain his decisions and there is no forum where those decisions can be reviewed. Nevertheless, Mr. Kissinger's

own access to the transcripts is unlimited, and he and his associates are assured a special working area at the Library where they can be used. A. 43a-44a.

If the transcripts had remained in Department custody, Department regulations would permit Mr. Kissinger to consult them to prepare his memoirs and for other purposes.[77] 5 FAM § 946. However, the transcripts also would be available to other government officials, as well as to historians, political scientists and journalists seeking access under the FOIA. If access were refused, it would thus be on the basis not of Mr. Kissinger's subjective preferences but the narrow standards in the FOIA's nine exemptions. Moreover, any denial of access would be accompanied by an explanation of the agency's rationale and that explanation would be subject to judicial review.

Thus, by removing the transcripts from Department custody, Mr. Kissinger has sought to substitute his own uncontrolled discretion for the FOIA's objective, impartial criteria for disclosing government information. The FOIA was enacted for the precise purpose of preventing government officials from exercising such absolute power over the disclosure of official records. Accordingly, a holding that the removal of the transcripts immunized them from the application of the FOIA would sanction a clear evasion of the Act.

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[77] Since the Department's "senior official rule" would have guaranteed Mr. Kissinger access to the transcripts if they remained in Department files, it would appear that Mr. Kissinger's primary reason for removing them was to prevent access by others. Thus, the Court could conclude that, while Mr. Kissinger may not have anticipated a specific FOIA request when he removed the transcripts, his overall objective was to frustrate public disclosure, and he therefore had an *intent* to evade the purposes of the FOIA.

B. The Cases Have Consistently Recognized That the FOIA Applies to Records That an Agency Owns But Does Not Possess

Prior cases and authorities have consistently recognized that the applicability of the FOIA turns not on whether documents are within the physical custody of an agency but on whether they are agency records and remain agency property despite their location.

In *Ciba-Geigy Corp.* v. *Mathews,* 428 F.Supp. 523, 529 (S.D.N.Y. 1977), for example, the court held "that the goals and purposes of the Act would be served best by imposing a standard which calls for proof that the records were either Government-owned *or* subject to substantial Government control or use." (Emphasis added.) This test clearly presupposes that records owned by a government agency are covered by the Act even if they are not subject to the agency's physical control. Similarly, in *Tax Reform Research Group* v. *I.R.S.,* 419 F.Supp. 415, 425 (D.D.C. 1976), the court held that the fact "[t]hat the agency may no longer be in physical possession of the records . . . is not determinative . . . if the agency knows what records a given request is directed towards, knows where those records are located, and is able to produce them." Indeed, the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 23-24 (1967) recognizes that the FOIA applies to records "in the possession *or control* of an agency." (Emphasis added.) Under this standard, records which the agency does not possess are subject to the Act if they are within the agency's legal control.

Mr. Kissinger and the Government rely on cases which indicate that, in response to an FOIA request, an agency has no duty to create records which do not

already exist,[78] procure documents that it does not own,[79] or recreate records that have disappeared.[80] Kiss. Br. 14-17; Gov. Br. 36-38. These cases are not in point. The requesters in this case do not seek documents which no longer exist, which must be specially created, or which the agency has lawfully relinquished to a private party. Instead, they seek documents which are pre-existing, are Department records in every respect but physical location, and were removed from agency custody not in the normal course of government business but in violation of law.

Under these circumstances, the agency retains an enforceable property interest in the documents, and thus exercises legal "control" over them even if it does not actually possess them. In this case, for example,

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[78] This was the situation in *N.L.R.B.* v. *Sears Roebuck & Co.,* 421 U.S. 132 (1975), where the Court held that an agency has no duty to compile information in response to an FOIA request that is not presently incorporated in an agency record. This holding accords with the Attorney General's statement that the Act "imposes no obligation to compile or procure a record in response to a request." *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act,* 23-24 (1967).

[79] In *Nichols* v. *United States,* 325 F.Supp. 130 (D. Kan. 1971), *aff'd,* 460 F.2d 671 (10th Cir.), *cert. denied,* 409 U.S. 966 (1972), the plaintiffs sought certain materials relating to the assassination of President Kennedy that the Navy Department had turned over to the Secret Service. No claim was made that this transfer was in any way unlawful and the court understandably held that the Department could not be required to produce materials that it had relinquished to another agency in the normal course of business. 325 F.Supp. at 137.

[80] *Nolen* v. *Rumsfeld,* 535 F.2d 890 (5th Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977), involved records that were missing and, despite the government's good faith efforts to locate them, had apparently disappeared.

the State Department's ownership of the transcripts was not affected by Mr. Kissinger's agreements with the Library of Congress, which he entered into as a private citizen who purported to hold the transcripts as "personal papers." Thus, the Department could have reduced the transcripts to possession at any time by asserting its ownership rights in an informal request to the Library.[81] In the event that the Library failed to comply, the Department would have had an enforceable property interest which entitled it to possession of the transcripts by legal compulsion.[82]

The application of the FOIA to the transcripts is supported by the decision of the Court of Appeals for the District of Columbia Circuit in *Forsham* v. *Califano,* 587 F.2d 1128 (1978), *cert. granted,* No. 78-1118 (May 14, 1979).[83] The raw scientific research data at issue in *Forsham* were created by private universities which were federal grantees. They had always been

[81] Mr. Kissinger was Secretary of State until January 20, 1977, several days after the MAP and RCFP FOIA requests were made. Any Department request during this period for the return of the transcripts would have necessarily had his authority as Department head. Since the "donation" of the transcripts to the Library purported to be for Mr. Kissinger's benefit, the Library undoubtedly would have complied with a Department request for their return which he authorized. Moreover, in view of the Library's willingness to comply with the order of the district court, it is hard to believe it would have resisted an assertion of ownership by the Department made even after Mr. Kissinger was no longer Secretary of State.

[82] Such a lawsuit, it should be stressed, would be based on preexisting property rights and should be distinguished from the situation where an agency exercises compulsory process (*i.e.*, by issuing a subpoena) to obtain custody of materials that it does not already own.

[83] On May 14, 1979, the Court set argument in *Forsham* and this case for the same day.

held at the University of Maryland, outside the physical custody of any federal agency, and were not, and had never been, in the possession of any federal employee. While the Department of Health, Education and Welfare had the right to obtain the data, it had never exercised that right and, thus, the data had never become its "records."[84] By contrast, the transcripts of Mr. Kissinger's telephone conversations were generated by a cabinet officer to aid in transacting official business, were used by other Department employees for this purpose, and remained in the State Department's possession for an extended period before leaving government custody.

In holding that the raw data in *Forsham* were not "records" subject to the FOIA, the court of appeals rested its decision not on the physical location of the data but on the lack of substantial government involvement in their creation and use. As the court determined, the FOIA does not apply to documents produced by a government contractor when there is no "significant government control of [the contractor's] day-by-day operation, or detailed involvement in the planning or execution" of its activities. 587 F.2d at 1138-39. In effect, the court held that such documents were not records covered by the FOIA because they were not, and had never been, government property.

Indeed, all three members of the *Forsham* panel expressly agreed that government participation in the

[84] This factor presents a critical distinction between this case and *Forsham*. It is one thing to require an agency to obtain documents in response to an FOIA request which it has never possessed and have never been its "records"; it is quite another to require the agency to retrieve documents which *are* its "records" and have been unlawfully removed from its custody.

creation and use of disputed documents, and not physical possession, should determine whether the FOIA applies. Judge Leventhal, writing for the court, stated that:

> "We do not suggest that mere physical possession of records by a government agency is the sole criterion for determining whether they fall within the scope of FOIA. Obviously a government agency cannot circumvent FOIA by transferring physical possession of its records to a warehouse or like bailee." 587 F.2d at 1136 n.19.

Similarly, Judge MacKinnon's concurring opinion observes that the FOIA applies "to records which belong to the agency *or* are in its possession" (*id.* at 1139) (emphasis added), while Judge Bazelon's dissent stresses that records "need not be located within the physical confines of the agency" so long as the "Government has a substantial degree of control over [their] use and disposition" (*id.* at 1144, 1143).

The lower courts invoked the same rationale in deciding this case. The district court determined that the transcripts of Mr. Kissinger's conversations had been "prepared and transcribed 'in the discharge of his official duties'." Pet. App. 58a. It therefore concluded that they were still "property" of the Department of State and, despite their physical location, were subject to disclosure under the FOIA. The court of appeals agreed with this approach. Pet. App. 49a. Thus, while involving divergent facts, the decisions below in *Forsham* and this case recognize that the FOIA applies to documents which are government property regardless of their physical location. This doctrine is plainly correct and should be adopted by this Court.

C. Retrieval of the Transcripts Under the Freedom of Information Act Is Not Barred by the Federal Records Act

The Government and Mr. Kissinger maintain that the order of the district court had the effect of creating a private cause of action to enforce the Federal Records Act since it required the State Department to repossess documents which had been removed from its custody in violation of the statutory procedures for records disposition. Private citizens, they assert, have no standing under the Act to seek relief against the unlawful disposal of agency records. Such relief, it is argued, can only be sought by the government in an action to recover wrongfully removed records under 44 U.S.C. § 3106. Kiss. Br. 23-29; Gov. Br. 29-34. This contention should be rejected for three reasons: (1) the FOIA alone authorized the lower court to require retrieval of the transcripts; (2) use of the FOIA to recover unlawfully removed records will promote, not weaken, the policies of the Federal Records Act; and (3) a private remedy under the FOIA against the unlawful removal of records will not interfere with legitimate agency record-keeping activities.

1. The FOIA Alone Authorized the District Court To Require Retrieval of the Transcripts

As demonstrated above, the FOIA applies to all records that an agency owns, wherever they are located. Thus, the FOIA—and not any other statute—conferred jurisdiction on the district court to decide whether Mr. Kissinger's removal of the transcripts was lawful. Once the court found that the transcripts had been wrongfully removed, it necessarily followed that they remain Department "records" to which the FOIA applies. It is no bar to relief under the FOIA that the transcripts first had to be returned to the De-

partment before the Act's disclosure requirements could be implemented. This Court has established that a court enforcing the FOIA may call upon its equitable powers to fashion appropriate remedies against violations of the Act.

In *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974), three defense contractors engaged in renegotiation proceedings unsuccessfully sought disclosure of certain documents from the Renegotiation Board. Relying on the FOIA, they sued to enjoin renegotiation proceedings before the Board until the documents were produced. The Board argued that, under the FOIA, the only relief that a court could grant was to order the disclosure of withheld documents. The Court disagreed. It held that, in order to protect rights secured under the FOIA, courts may exercise their "inherent capacity to provide appropriate equitable relief." 415 U.S. at 16-20.[85]

If it is permissible to enjoin administrative proceedings to protect rights secured by the FOIA, then the district court was certainly empowered to direct the Department of State to repossess documents that the Department owns and that, in every respect except physical location, are "records" subject to the FOIA.[86]

[85] It is widely recognized that *Bannercraft* provides authority for enjoining agency proceedings in the absence of compliance with the FOIA. *See, e.g., United Telephone Company of Pennsylvania* v. *F.C.C.*, 375 F.Supp. 992 (M.D. Pa. 1974); *Capital Cities Communications, Inc.* v. *N.L.R.B.*, 409 F.Supp. 971 (N.D. Cal. 1976).

[86] Other courts have relied on the *Bannercraft* holding in similar situations. In *Nixon* v. *Sampson, supra*, 389 F.Supp. at 121-22 n. 34, Judge Richey determined that, under *Bannercraft*, he was empowered to issue a declaratory judgment that Mr. Nixon's agreements with GSA were void and his presidential materials were therefore "records" subject to the FOIA.

If no such remedy were available, FOIA litigants would be forced to watch helplessly while government officials withheld important information by removing records from government property or transferring them to branches of the government to which the Act does not apply. The absence of relief in this situation would defeat the objectives of the FOIA.

2. Retrieval Actions Under the FOIA Are Consistent With The Policies of the Records Acts

Since requesters rely on the FOIA to support the district court's order, the Court need not consider whether a private right of action can be implied under the Federal Records Act.[87] That Act would be relevant to the Court's inquiry only if its legislative history or underlying policies evidenced a clear Congressional intent against applying the FOIA to unlawfully removed records. In fact, however, no such intent can be discerned.

Mr. Kissinger and the Government point out that the legislative histories of the Federal Records Act, Records Disposal Act and FOIA do not contain an express statement that FOIA requesters would be able to sue for the disclosure of wrongfully removed records. Kiss. Br. 26-27; Gov. Br. 37. By the same token, however, nothing in these legislative histories indicates that the FOIA was *not* intended to apply to such records. In the face of such silence, it is a logical assumption that Congress expected the courts to adopt a construction of the FOIA which comports most fully with

[87] We do not concede that no such right of action exists, only that the Court need not decide the question. The RCFP Complaint specifically invoked the Records Act as a basis for relief, *see* A. 34a-35a, and thus the Act provides a potential alternative basis for upholding the decisions of the courts below.

its language and basic purpose. We have shown that the goals of the FOIA would be frustrated if records otherwise subject to the Act became immune from disclosure when they were removed from an agency's physical custody. Congress would not have wanted to diminish the public's rights under the FOIA simply because the Government has an independent right to recover unlawfully removed records under a separate statutory scheme.

Equally important, there is no conflict between citizen's suits to retrieve such records under the FOIA and the objectives and policies of the two federal records statutes. The recovery of wrongfully removed records is not merely a matter of internal government housekeeping. The text and legislative histories of the Federal Records and Records Disposal Acts demonstrate that their procedures for records preservation were also intended to benefit interested members of the public.

Under 44 U.S.C. § 2902(5), a primary purpose of records management is "[j]udicious preservation and disposal of records." Moreover, under 44 U.S.C. § 3101, each federal agency must "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency." A major goal of these provisions is to promote public understanding of government activities. Under 44 U.S.C. § 3303, records must be preserved not merely to meet agency needs but because they have "sufficient administrative, legal, research, or other value" to aid informed citizens. According to the House Report, the safekeeping of valuable records was "the primary purpose" of the Records Disposal Act,[88] and the National Study Commission on the Records and Documents of Federal Officials has concluded that the Act is principally motivated by "the interests of preserving records for their legal and research value." [89]

This Court has recognized that "[p]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records" to interested citizens. *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 495 (1975). When records of important agency business are removed from government custody in violation of the statutory scheme for records disposal and preservation, these functions are impaired. Once a valuable record falls into private hands, it becomes inaccessible to journalists and scholars and the supply of revealing information about government activities is reduced. Thus, the unlawful removal of records does not merely harm government agencies; it harms members of the informed public who are the ultimate beneficiaries of the government's recordkeeping decisions under the Records Disposal Act. For this reason, FOIA suits which seek the disclosure of unlawfully removed records contribute to the Act's objectives by insuring that full documentation of official decisions and policies remains in government files.

There is, moreover, reason to question the effectiveness of government retrieval actions under the Federal Records Act in deterring the unlawful removal of rec-

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[88] H.R. Rep. No. 559, 78th Cong., 1st Sess. 1 (1943).

[89] National Commission, *Memoranda of Law* 90 (1977).

ords. 44 U.S.C. § 3106 provides that the Attorney General can file suit to recover records only when an agency head has notified GSA that those records have been wrongfully removed. Agency heads are understandably reluctant to recommend legal action against senior officials who have improperly removed documents. Indeed, when the official in question is himself an agency head, as was Mr. Kissinger, an obvious conflict of interest exists and the filing of a retrieval action is next to impossible.[90] Recognizing these problems, the State Department has acknowledged that, as a practical matter, "the records officer of the Department cannot formally compel compliance by senior officials" with statutory disposal procedures and that the Department's retention of the records of these offi-

[90] Significantly, the unlawful removal of records by high officials was one of the major motivations for enacting the Records Act. According to the *Task Force Report on Records Management in the United States Government* 27 (1948), prepared by the U.S. Commission on Organization of the Executive Branch of the Government:

> "Records removed by officials leaving the public service present a specially critical problem. Many and varied measures to prevent such removal have been adopted by other governments. For the most part, the removal of records is confined to high-ranking officials. As a result, most of the records removed are important or valuable. While it is important that records be defined by law as the property of the Federal Government and there be penalties for unlawful destruction, removal, or falsification of such records, it is equally important that the Congress set up the machinery to forestall such loss, to effect recovery in the event of such loss, and provide that records so removed are recoverable at no cost to the Federal Government. The papers of some Presidents and Cabinet officials have had to be purchased by the Federal Government."

cials "has depended more on persuasion and good faith than on compulsion." A. 207a.[91]

The use of criminal penalties to deter the removal of records is even more problematic.[92] The National Study Commission has observed that "criminal sanctions are seldom applied and few prosecutions have been brought."[93] The Commission concluded that "enforcement of statutes and regulations governing records retention constitutes a major 'problem area,' and enforcement mechanisms besides the 'extreme step' of informing the Department of Justice of possible Criminal Code violations may need to be devised."[94]

FOIA suits for the disclosure of wrongfully removed records can strengthen implementation of the federal records statutes by affording an alternative remedy in cases where the Government is hesitant to invoke civil or criminal sanctions against former officials of great stature and influence. In view of the important role of all three statutes in preserving valuable records for public use and disclosure, a private remedy under the

[91] A paper prepared for the National Commission has commented that a major "reason for the removal of certain papers from the State Department, including large numbers of copies, is that Secretaries and some senior officials will always be concerned with 'protecting' themselves from future exposure or embarrassment." According to the author, it "is very doubtful that any action taken by the State Department short of criminal prosecution for removal of papers would change this situation." A. Nelson, *Foreign Policy Records and Papers, supra,* at 64.

[92] Among the criminal statutes which potentially apply to the unlawful removal of records are 18 U.S.C. § 641, 18 U.S.C. § 2071 and 18 U.S.C. § 798.

[93] National Commission, *Public Hearings Background Memorandum* 37 (1977) (footnote omitted).

[94] *Id.* (footnote omitted).

FOIA would enhance—not weaken—the overall effectiveness of the records management scheme created by Congress.

3. FOIA Retrieval Actions Will Not Cause Judicial Intrusion Into Agency Recordkeeping Activities

The Government and Mr. Kissinger suggest that the application of the FOIA to unlawfully removed records will result in judicial intrusion into agency recordkeeping functions and undermine orderly management of agency record programs. Kiss. Br. 24; Gov. Br. 34. These fears are groundless. Retrieval actions under the FOIA will be rare and, if recordkeeping considerations dictate judicial restraint in a particular case, the courts will decline to exercise their equitable powers under the FOIA.

The FOIA applies to "records" in the custody or control of an agency. 5 U.S.C. § 552(a)(4)(B). A document created to facilitate agency business but removed from its custody in accordance with statutory disposal procedures is no longer owned or possessed by the agency and is thus not a "record." Since such a document has been removed *lawfully,* it is not agency property and the agency could not be compelled to retrieve it in response to an FOIA request.

The FOIA would authorize retrieval only when a document has been removed from agency custody in disregard of statutory procedures and as a result of the unauthorized acts of individual agency officials. The removal of such a document does not reflect a determination by the agency that the document is no longer needed for agency business. Since the statutory procedures for such recordkeeping determinations have been bypassed, the agency has never considered

whether the document should be retained but merely acquiesced in the unlawful acts of its employees. In this situation, judicial relief under the FOIA would not usurp statutory recordkeeping responsibilities; the agency has defaulted on those responsibilities to start with.

The availability of FOIA relief in these limited circumstances would impose negligible burdens on the government. The Records Disposal Act, augmented by regulations of GSA and individual agencies, contains a clearcut and comprehensive scheme for reviewing records that agencies wish to discard and determining whether they are necessary for the transaction of government business. Virtually all unneeded records are —or should be—removed from agency custody in accordance with these requirements and agency decisions respecting these records could not be reviewed under the FOIA. The Act would apply only when—as in this case—applicable procedures for records disposition have been ignored, the agency has made no effort to recover wrongfully removed documents, and a request for the documents is filed under the FOIA. Invoking the FOIA in this very uncommon situation will not increase the duties of federal agencies under the FOIA or otherwise impede their operations.

On those rare occasions where a remedy under the FOIA would interfere with agency recordkeeping functions, the district courts would be justified in declining to invoke their equitable powers under the Act.[95] For example, equitable relief might be inappro-

[95] The existence of equitable jurisdiction under the FOIA to order the return of unlawfully removed records does not mean that such a power must be exercised in every case. For example, in *Renegotiation Board* v. *Bannercraft Clothing Co., supra,* this

priate where the FOIA requesters knew that documents would be removed but delayed unreasonably in seeking their disclosure; where substantial time has passed after the documents' removal before an FOIA request was filed; or where the agency has provided a compelling explanation for its failure to institute a retrieval action and demonstrated that retrieval of the documents would harm government interests.

In this case, however, the district court's decision that the equities favored the granting of relief is unassailable. The RCFP requesters were not guilty of any delay in seeking disclosure of the transcripts. Mr. Kissinger's monitoring of his State Department telephone conversations first became known in late 1976, and the requesters had no reason to suspect that the transcripts would be removed from Department custody nearly three months before Mr. Kissinger's term as Secretary expired. Thus, the requesters sought access to the transcripts as promptly as circumstances permitted.

Equally important, the Government has never offered any reason to justify its failure to retrieve the transcripts or argued that such retrieval would harm its interests. Indeed, the only plausible explanation for the Government's inaction is its evident reluctance to institute judicial proceedings—alleging the unlawful removal of State Department property—against a former Secretary of State of Mr. Kissinger's undeniable prestige. While this reluctance may be understandable from the Government's standpoint, it vividly dem-

Court held that, while the lower courts could exercise their equitable powers under the FOIA to enjoin renegotiation proceedings, such relief would be inappropriate in the particular case at hand.

onstrates why concerned citizens should have an independent right to sue under the FOIA for the disclosure of unlawfully removed records.

III.

THE TRANSCRIPTS RECORDING MR. KISSINGER'S WHITE HOUSE CONVERSATIONS SHOULD BE RETURNED TO THE DEPARTMENT FOR FOIA REVIEW AND DISCLOSURE

In all important respects, the transcripts that originated when Mr. Kissinger was Secretary of State are identical to the transcripts of his telephone conversations as Assistant to the President. Both sets of documents record the transaction of official business, were used to assist Mr. Kissinger in discharging his governmental duties, were produced by government employees, and were stored on government premises. Moreover, as Mr. Kissinger prepared to leave the government, he removed both sets of transcripts from Department custody and "donated" them to the Library of Congress. In each instance, the basis for these actions was the erroneous theory that the transcripts were Mr. Kissinger's personal papers, and neither set of transcripts was subjected to the procedures for records disposition required by the Records Disposal Act.[96]

Because of these considerations, the lower courts held that the State Department transcripts were official

[96] The White House transcripts were also subject to the Records Disposal Act's scheme for the disposition of official records. 44 U.S.C. § 2901 incorporates the definition of agency in 40 U.S.C. § 472(a). This definition, in turn, applies to "any executive department or independent establishment in the executive branch of the Government". The White House would appear to qualify as an "agency" under this definition.

records that Mr. Kissinger had unlawfully removed from Department custody. This conclusion would have been equally proper for the White House transcripts as well. Indeed, one of the RCFP requesters, William Safire, sought disclosure of portions of the White House transcripts *before* they left the Department and, thus, they were actually in the Department's possession when a request for FOIA access was made.

The only difference between the two groups of transcripts is that one concerns the affairs of the State Department while the other reflects the affairs of the President and the NSC. For three reasons, however, this factor was not sufficient to exempt the White House transcripts from the State Department's disclosure responsibilities under the FOIA: (1) an agency which possesses documents that record the transaction of official business cannot withhold those documents under the FOIA merely because they were originated elsewhere in the government; (2) documents produced in the White House Office of the President lose their immunity from the FOIA when they are transferred to other agencies and the President does not exercise any further control over their use; and (3) the NSC is an "agency" to which the FOIA applies and transcripts that reflect Mr. Kissinger's NSC duties would be covered by the Act even if they had stayed at the White House.

A. The FOIA Applies to Records That Originate Elsewhere in the Government

5 U.S.C. § 552(a)(3) provides that "*each* agency, upon any request for records which . . . reasonably describes such records . . . *shall* make the records promptly available to any person" (emphasis added). This provision does not limit an agency's disclosure obligations to documents which were created in connection with its own business and exclude documents that the agency acquired from other parts of the government. Rather, it applies to *all* "records" in the agency's possession regardless of their source.

The legislative history of the FOIA describes agency disclosure responsibilities in similar terms. The floor debates on the Act emphasize that it was intended to enable citizens "to know the facts about the operation of their government" [97] and "to be fully informed about the policies and activities of the Federal Government." [98] Moreover, the Senate Report stresses that the Act requires the disclosure of "*all materials* of the government" unless specifically withheld under one of the Act's nine exemptions. S. Rep. No. 1219, *supra,* at 15 (emphasis added). The plain implication of these statements is that an agency must disclose all documents in its possession which constitute "records" of the federal government, whether they originated in connection with the agency's business or reflect the affairs of some other government entity and later entered agency custody.

Decisions of the lower courts uphold this principle. For example, in *Tax Reform Research Group* v. *IRS,* 419 F.Supp. 415 (D.D.C. 1976), the court required the IRS to disclose documents originated at the White House and later provided to the IRS by the Department of Justice. To deny an FOIA request merely because records were originated at some other agency,

[97] 112 Cong. Rec. 13657 (1966) (remarks of Rep. Reid).

[98] 112 Cong. Rec. 13648 (1966) remarks of Rep. Faschell).

the court determined, would frustrate the objectives of the Act:

> "To hold that a document received by an agency and actually used by it in agency decisionmaking is not an agency record for purposes of the Act simply because the document was not generated by that agency . . . would seriously undermine one of the central purposes of the Act; to allow the public to become informed of the bases for agency decisions and actions. Such a holding would contradict the mandates of Congress that documents be disclosed unless specifically exempt and that the balance should be tipped in favor of disclosure in questionable situations." 419 F.Supp. at 425.

The Government and Mr. Kissinger suggest that this principle does not apply to the White House transcripts because, even though stored in Mr. Kissinger's State Department office, they were never actually in the Department's "custody." To support this claim, it is pointed out that Mr. Kissinger kept the transcripts in files marked "personal" and the Department did not contest their "personal" status. Gov. Br. 54; Kiss. Br. 52. As the Government itself concedes, however, the transcripts were owned by the government for the duration of Mr. Kissinger's term as Secretary of State. Gov. Br. 22. Thus, while the White House transcripts were stored on its premises, the Department exercised control over them and could have produced them under the FOIA at any time.[99] Moreover, when the White

[99] The Department in fact exercised its control over the White House transcripts on at least two occasions—when Department officials reviewed transcripts sought by Mr. Safire to determine if they contained classified information (A. 259a) and when the Undersecretary of State for Management prepared extracts of the White House transcripts for inclusion in NSC files (A. 248a).

House transcripts were located in his Department office, Mr. Kissinger was not a private citizen, but Secretary of State, exercising all of the State Department's governmental powers. Surely, documents relating to official business which are stored in a Department Secretary's files do not cease to be in that Department's control merely because he mistakenly regards them as his personal papers.

Mr. Kissinger and the Government also assert that the White House transcripts were never in the Department's custody because there is no evidence that they were ever used to facilitate Department functions. Gov. Br. 53; Kiss. Br. 50-51. The significance of this factor is highly debatable. Documents relating to government business and in the possession of an agency should not be exempt from FOIA disclosure merely because they were never actually used in that agency's operations. In this event, documents that reveal information about government activities could be withheld from the public simply because they happened to be kept by an agency that had never used them to conduct its own affairs. This result cannot be squared with the purposes of the FOIA.

To the extent that the Department's use of the White House transcripts is at all relevant, moreover, the record is insufficient to decide the issue. The significance of this factor only emerged after the court of appeals emphasized it in its decision. Pet. App. 50a. Accordingly, no evidence was ever presented in the district court which bears on the point one way or the other.[100]

[100] The most logical inference from the facts which *are* supported by the record is that the Department *did* use the White House transcripts. If the transcripts had no connection with Mr. Kissin-

For this reason, if the Court determines that the issue has any bearing on the status of the White House transcripts under the FOIA, it should remand this portion of the case for discovery and perhaps an evidentiary hearing on the extent to which the State Department used these transcripts in conducting its business.

B. The Transcripts Ceased to Be Immune From the FOIA as Records of the President's White House Office When They Left the White House

Mr. Kissinger also contends—and the court of appeals agreed—that the transcripts were not subject to FOIA disclosure because the Act does not apply to records of the President's White House Office. While this argument might be valid if the transcripts had remained in the White House, it ceased to apply when they were relinquished to the Department of State.

The Conference Report for the 1974 FOIA Amendments indicates that the term "agency" does not include the President's White House Office—*i.e.*, "the President's immediate personal staff or units in the

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ger's duties as Secretary of State, it would have been unnecessary to store them on Department premises; they would have been left at the White House or removed from government custody altogether. Moreover, Mr. Kissinger has consistently conceded that the transcripts were used by his Department aides for a variety of job-related purposes (A. 244a-245a), and it is logical to conclude that this examination included the White House transcripts as well as those generated by Mr. Kissinger at the State Department. Indeed, at the direction of the Department's Legal Adviser, extracts were prepared upon Mr. Kissinger's retirement not merely of the transcripts from his State Department period, but of those from his White House period as well. This extracting process was conducted by the Undersecretary of State for Management and purported to be based on requirements imposed by Department regulations. A. 248a.

Executive Office whose sole function is to advise and assist the President." H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess. 15 (1974). One lower court, accordingly, has held that the FOIA does not apply to the White House Office of the President. *Nixon* v. *Sampson, supra,* 389 F.Supp. at 147. *Cf. Soucie* v. *David, supra,* 448 at 1074-1076.

This case, however, does not involve records of a presidential advisor which were retained in the White House for the immediate use of the President and his aides. When Mr. Kissinger resigned as Assistant to the President and became Secretary of State, the transcripts were moved from the White House to the Department and, for an extended period, were filed in Mr. Kissinger's Department office. Moreover, after the transcripts left its custody, the White House imposed no restrictions on their use and never indicated that it expected them to be returned. In short, any interest that the White House might have asserted in the transcripts was surrendered when they left White House custody, and control over their use and disposition effectively passed to the Department of State.

While the 1974 Amendments to the FOIA were under consideration by Congress, the Department of Justice argued that the White House Office should be exempt from the Act because its employees "are among a President's most trusted advisors and the need for those persons to speak candidly on highly confidential matters is obvious." H.R. Rep. No. 93-876, 93d Cong., 2d Sess 20 (1974). This rationale has no application to documents which originate in the White House Office but are later circulated to other agencies without any effort by the President to exercise continuing control or maintain their confidentiality. Under such

circumstances, the justification for exempting records produced by the White House Office from the FOIA is no longer relevant. Those documents should therefore be treated like all other records of official business to which the FOIA applies.[101]

A similar analysis was followed by the Court of Appeals for the District of Columbia Circuit in *Goland* v. *CIA*, No. 76-0166 (May 23, 1978), *pet. for cert. pending*, No. 78-1924, which involved an FOIA request for the transcript of a House of Representatives committee hearing that had been loaned to the CIA. Because the committee had taken elaborate precautions to assure that its hearings were conducted in secrecy and the transcript remained confidential, the court determined that it remained "under the control of and continues to be the property of the House of Representatives." Slip op. 12-13. As the court elaborated, "the document is in no meaningful sense the property of the CIA; the Agency is not free to dispose of the Transcript as it wills, but holds the document, as it were, as a 'trustee' for Congress." *Id.* at 13. The court cautioned that it reached this result only because "Congress' intent to retain control of the document is clear" and observed that "[o]ther cases will arise where this intent is less plain." *Id.* at 14.

Here, in contrast to *Goland*, the White House did not instruct the State Department to maintain the secrecy of the transcripts or reserve its right to seek their return. Thus, the White House expressed no intent to retain control of the transcripts, and ownership passed to their new custodian, the Department of State. When possession and control of documents recording the transaction of official business shift from an entity which is not subject to FOIA to one which is, the documents become "records" to which the Act applies and the agency which acquires the documents should become responsible for their disclosure.

[101] Since it is normal practice for White House records to be disseminated to other agencies, a holding that such records are indefinitely immune from FOIA disclosure would seriously erode the obligations created by the Act.

C. At a Minimum, Transcripts Reflecting Mr. Kissinger's NSC Duties Are Subject to the FOIA

Even if the transcripts preserved their status as White House records after they were moved to the Department of State, they would not be immune from FOIA disclosure in their entirety. To the extent that particular transcripts were records of the NSC rather than the White House Office, the Act would still apply.

In *Soucie* v. *David, supra*, the court of appeals held that the FOIA applied to the Office of Science and Technology because it was part of the Executive Office of the President. 448 F.2d at 1075. The court suggested that the National Security Council had a similar status, *id.*, at 1074, a view that this Court apparently shared in *EPA* v. *Mink*, 410 U.S. 73 (1973), where the FOIA was applied to a report prepared by the National Security Council system. The 1974 Amendments to the FOIA explicitly define "agency" to include the Executive Office of the President, *see* 5 U.S.C. § 552 (e), and the legislative history of these amendments cites the NSC as an executive agency to which the Act applies. H.R. Rep. No. 93-876, *supra*, at 8.

The *United States Government Manual* for Mr. Kissinger's White House years identifies the Assistant

to the President For National Security Affairs as the ranking official of the NSC. A. 268a, 270a, 272a, 273a, 274a, 275a, 276a. Moreover, charts describing the NSC's organization make it clear that the President's Assistant for National Security Affairs is responsible for directing the activities of the NSC's standing committees of foreign policy officials from different federal agencies and its permanent staff of national defense analysts. A. 278a-279a.

The many published accounts of Mr. Kissinger's White House years indicate that he was an unusually active NSC head, devoting considerable time and energy to overseeing the Council's policy deliberations and research projects.[102] Reflecting the close nexus between Mr. Kissinger's White House duties and the NSC's operations, for example, is the fact that extracts from the White House transcripts were deposited not with the White House Office but in NSC

[102] In *The Illusion of Peace* 12 (1978), Tad Szulc has described Mr. Kissinger's relationship to the NSC as follows:

> "Redesigning the mechanism of the National Security Council, ostensibly the government's highest-ranking policy-making group in the area of foreign policy, Kissinger created seven NSC committees to develop and study new policies, and he assigned himself to chair six of them. As the president's assistant for national security affairs, Kissinger not only controlled the council itelf, sitting at Nixon's elbow, but from the first day took charge of every move within the NSC mechanism."

Similar descriptions of Mr. Kissinger's NSC activities are contained in M. Kalb and B. Kalb, *Kissinger* 78-91 (1974) and B. Mazlish, *Kissinger: The European Mind In American Policy* 223-227 (1976). For historical studies of the NSC which discuss the roles of both Mr. Kissinger and his predecessors, *see* R. Falk, "The National Security Council Under Truman, Eisenhower and Kennedy", 79 Political Science Quarterly 403-434 (September 1964), and D. Hall, "The 'Custodian-Manager' of the Policymaking Process", 2 *Commission on the Organization of the Government for the Conduct of Foreign Policy* 100-119 (1975).

files. A. 248a.[103] Accordingly, a sizable number of the White House transcripts record conversations in which Mr. Kissinger was performing his duties as the NSC's chief administrator, not furnishing advice to the President. At a minimum, transcripts of conversations in which Mr. Kissinger was coordinating and controlling the affairs of the NSC are subject to disclosure under the FOIA.

The court of appeals, however, held that cross-petitioners had not qualified for disclosure of NSC-related transcripts because they had never filed an FOIA request with the NSC. Pet. App. 50a. This approach is not only illogical, it conflicts with both the text of the FOIA and other decisions of the lower courts implementing the Act.

5 U.S.C. § 552(a)(6)(B)(iii) provides that the deadline for answering FOIA requests may be extended for 10 days to permit consultation "with another agency having a substantial interest in the determination of the request . . . ." Underlying this provision is an expectation that the agency with physical custody of requested documents would have primary responsibility for disclosing them under the FOIA and, where necessary, the originating agency would participate by offering advice and guidance. Indeed, any other procedure would be grossly inefficient. The FOIA requester who had the misfortune to seek records created elsewhere in the government would be forced to file an additional request with the originat-

[103] The NSC in fact has a remarkably complete and formal set of files which is maintained separately from the files of the White House Office. A. Nelson, *Foreign Policy Records and Papers, supra,* at 21-23.

ing agency, which would then have to reclaim possession of the documents before the request could be acted upon. Thus, the lower courts have consistently held that records of one agency which are in the custody of another may be obtained by an FOIA request to the agency which possesses them. *Tax Reform Research Group* v. *IRS, supra; Nixon* v. *Sampson, supra,* 389 F. Supp. at 145-146.

In this case, the State Department was the last agency with custody and control of the White House transcripts. An FOIA request to the Department was therefore a logical first step in obtaining their disclosure. If this Court determines that the FOIA applies to the transcripts, the most efficient review procedure will be to assemble all of the transcripts in one location where a single group of archivists can organize them into their respective categories and determine the extent to which they fall within the FOIA's exemptions. Returning all the transcripts to the Department is the best way to achieve this objective. While NSC representatives undoubtedly should be involved in the review process, it makes no sense to postpone screening the White House transcripts until requesters have made the formal gesture of filing an FOIA request with the Council.[104] If the NSC transcripts are records

[104] At this late stage of the case, filing an FOIA request with the NSC will be singularly unproductive. The threshold issues relating to the White House transcripts—whether they are "records" and, if so, whether the Act still applies to them despite their present location—will already have been resolved by this Court's decision. On the other hand, since the NSC does not now have access to the transcripts, it is in no better position than the State Department to make judgments concerning the application of the FOIA's exemptions.

subject to the FOIA, a request to the last agency which possessed them should be sufficient to invoke the Act.[105]

IV.

THE PROCESSING AND DISCLOSURE OF THE TRANSCRIPTS PURSUANT TO THE FOIA WILL NOT VIOLATE MR. KISSINGER'S PRIVACY RIGHTS UNDER THE CONSTITUTION

Mr. Kissinger also attacks the district court's decision on the ground that it unconstitutionally invades

[105] Mr. Kissinger has suggested that, in the proceedings below, cross-petitioners did not focus on his NSC duties in a timely manner and, hence, the issue was inadequately considered by the lower courts. Kiss. Br. 52-53. This contention is misleading and inaccurate. By seeking access to the transcripts of Mr. Kissinger's conversations as Assistant to the President, cross-petitioners' Complaint necessarily encompassed conversations relating to the NSC; as noted in the text, the Assistant to the President for National Security Affairs has traditionally functioned as the Council's chief executive.

Moreover, when Mr. Kissinger opposed their motion for summary judgment by arguing that the White House Office is exempt from the FOIA, cross-petitioners responded by pointing out that the Executive Office, including the NSC, is not within this exemption. As a result, both before and after the parties' cross-motions for summary judgment were decided by the district court, the special status of the NSC transcripts was briefed thoroughly by cross-petitioners and Mr. Kissinger. *E.g.,* Plaintiffs Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, in Opposition to Defendant Kissinger's Motion for Summary Judgment and in Opposition to the Government's Request for Production of Documents, August 8, 1977, at 45-46; Reply Memorandum of Points and Authorities by Defendant Henry A. Kissinger in Support of His Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, August 22, 1977, at 12-13. The issue of the NSC-related transcripts was then briefed again in the court of appeals by all parties, including the Government, and decided on its merits. Thus, the application of the FOIA to transcripts relating to Mr. Kissinger's NSC duties was raised in a timely manner below and is properly before this Court now.

his privacy rights by requiring State Department records officers to obtain and review transcripts of conversations that concern personal matters. Kiss. Br. 45-48. This argument is insubstantial.

As a record of Mr. Kissinger's telephone conversations during each working day, the transcripts relate predominantly to official business. Mr. Kissinger was an important government official with numerous responsibilities, and he undoubtedly devoted little official time to arranging his social life, communicating with his family or managing his finances. It is clear that the telephone conversations of a high government official while discharging his government duties are not constitutionally protected from public disclosure. In *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977), this Court held that "the public has a recognized interest" in documents which concern official business and such documents are not encompassed by any right of privacy. 433 U.S. at 459, 462. This conclusion accords with the long-established principle that the right of privacy "does not extend to matters of public interest or to persons properly in the public eye . . ." [106]

In addition, as demonstrated above, the transcripts were the property of the government during Mr. Kissinger's term as Secretary of State [107] and, under his

[106] *Dodd* v. *Pearson,* 279 F.Supp. 101, 105 (D.D.C. 1968) *aff'd in part* and *rev'd in part on other grounds,* 410 F.2d 701 (D.C. Cir. 1969), *cert. denied,* 395 U.S. 947 (1969). *See also, e.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *Cox Broadcasting Corp.* v. *Cohn, supra.*

[107] This conclusion may even apply to conversations relating to Mr. Kissinger's personal affairs. Such conversations were monitored and transcribed in order to insure that there were full records of all discussions pertaining to official business. A. 245a. Thus, although not involving government matters as such, the transcripts of personal conversations were created as part of Mr. Kissinger's official duties and, for this reason, quite possibly qualify as government property.

agreements with the Library of Congress, Mr. Kissinger has now surrendered to the United States any ownership interest which he once claimed to have. It is settled that, where a person is neither the owner of property nor the possessor of it, he cannot validly claim that its seizure by the government violates his Fourth or Fifth Amendment rights. *See, e.g., Brown* v. *United States,* 411 U.S. 223, 229 (1973); *United States* v. *White,* 322 U.S. 694, 699 (1944); *Bellis* v. *United States,* 417 U.S. 85 (1974); *United States* v. *Haden,* 397 F.2d 460, 465 (7th Cir.) *cert. denied,* 396 U.S. 1027 (1968).[108] Moreover, as the Court emphasized in *Wilson* v. *United States,* 221 U.S. 361, 380 (1911), even actual possession is not a basis for resisting inspection when the government seeks to examine "public records and official documents, made or kept in the administration of public office . . ."

As Mr. Kissinger points out, the district court required the return of all the transcripts to the Department so Department records officers could separate those few transcripts that are purely personal from

[108] In *Gibson* v. *United States,* 149 F.2d 381, 384 (D.C. Cir. 1945), *cert. denied,* 326 U.S. 724 (1945), the court stated: "[T]he settled doctrine is that objection to evidence obtained in violation of [the Fourth Amendment] may be raised only by one who claims ownership in or right to possession of the premises searched or the property seized . . . ."

the vast majority that are official in nature.[109] However, the need for this procedure was created by Mr. Kissinger himself, who found it more convenient to monitor both personal and business conversations and intermingle the resulting transcripts than to store the two classes of documents separately. Having decided to mix personal and official transcripts indiscriminately, Mr. Kissinger can hardly complain about a screening procedure designed to segregate government-related materials.[110]

The legality of the procedure required by the district court is conclusively established by this Court's decision in *Nixon* v. *Administrator of General Services, supra,* which holds that GSA could take possession of the complete materials of Mr. Nixon's Presidency in order to separate personal from official documents:

> "Thus, the Act 'is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives. The processing contemplated by the Act—at least as narrowed by carefully tailored regulations—represents the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding importance.' We agree with the District Court that the Act does not unconstitutionally invade appellant's right of privacy." 433 U.S. at 456-57 (citation omitted).

[109] Mr. Kissinger objects to the district court's order on the ground that it requires the Department to repossess portions of the notes that relate to purely personal matters and makes no provision for the return of these materials to him. Kiss. Br. 46-47. At no time in this litigation, however, has Mr. Kissinger asked for this relief. Requesters have never sought disclosure of transcripts of purely personal conversations and would not object to a procedure which provides for the return of these transcripts to Mr. Kissinger after their review by State Department records officers.

[110] Under the common law, one who causes his personal property to be intermingled with the property of another may lose the property entirely. Brown, *Personal Property* §§ 30-34 at 64-76 (2d ed. 1955). Also a trustee who intermingles property of the trust with his own must suffer any loss resulting therefrom. II Scott, *Trusts* §§ 179.1 at 1430-31 (3d ed. 1967).

As in *Nixon,* only review of the complete transcripts by Department records officers can assure that those portions which reflect official business are returned to the Department in their entirety.[111] The alternative—permitting Mr. Kissinger himself to segregate official from personal materials—would create a serious risk that transcripts which reflect government business will never be processed under the FOIA. Moreover, the archival screening required by the district court will result in a minimal invasion of Mr. Kissinger's privacy. The few portions of the transcripts that are purely personal in character will undoubtedly be withheld from disclosure and, thus, will never be publicized

[111] A similar procedure was also upheld by this Court in *Department of the Air Force* v. *Rose,* 425 U.S. 352 (1976). That case involved an FOIA request for certain case summaries of honor and ethics hearings concerning cadets at the Air Force Academy. The Court agreed with the Air Force that "the disclosure of these summaries implicates . . . privacy values." 425 U.S. at 376. It therefore directed the district court to edit the case summaries to delete personal information—recognizing that this information would necessarily be disclosed to the district judge. To the objection that this disclosure would itself constitute an invasion of privacy, the Court responded that "the in camera procedure [ordered] will further the statutory goal of . . . a workable compromise between individual rights 'and the preservation of public rights to Government information.' " 425 U.S. at 381.

outside of the narrow circle of State Department officials charged with reviewing them.[112] And since Mr. Kissinger routinely circulated the transcripts to other Department employees and allowed them to be reviewed by Mr. Eagleburger so he could prepare extracts, the additional screening required by the district court will be no more intrusive than the screening that occurred when the transcripts were in Department custody. Under these circumstances, the injury to Mr. Kissinger's privacy will be *de minimis* and can easily pass Constitutional muster.

[112] In addition, the district court's order provides that, before any portions of the transcripts can be disclosed to the public, they must be reviewed by Mr. Kissinger himself, who will then have an opportunity to enjoin their release under FOIA exemption 6, which forbids "clearly unwarranted invasions of personal privacy." As discussed in n. 25 *supra*, we question whether this procedure is permissible under the FOIA. Nevertheless, the Court should be aware of the additional protection it affords to Mr. Kissinger's privacy interests.

CONCLUSION

The decisions of the courts below properly required the return of the transcripts of Mr. Kissinger's telephone conversations as Secretary of State to the State Department for review and processing under the FOIA. The Court should therefore affirm this portion of the decisions below. However, the lower courts erred in refusing to grant identical relief in connection with the transcripts of Mr. Kissinger's telephone conversations as Assistant to the President. Accordingly, the Court should direct the district court to enlarge its order so it applies the FOIA to these transcripts as well.

Respectfully submitted,

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